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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 985

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1947

CERTIORARI GRANTED JUNE 16, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 96

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 IN THE TAX COURT OF THE UNITED STATES

Docket No. 3489

ESTATE OF FRANCOIS L. CHURCH, DEC'D, EDWARD E. BLACK, EXECUTOR, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Richard E. Dwight, Esq., Wm. W. Owens, Esq., Charles V. Parsell, Esq. For Comm'r: Robert S. Garnett, Esq.

Docket entries

1943

Nov. 23—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 24—Copy of petition served on General Counsel.

Nov. 23—Request for Circuit hearing in New York filed by taxpayer 11/25/43 Granted.

Dec. 29—Answer filed by General Counsel.

1944

Jan. 1—Copy of answer served on taxpayer. New York City.

Mar. 30—Hearing set May 22, 1944, in New York City.

May 22—Hearing had before Judge Arundell on merits. Briefs due 7/6/44. Replies 7/21/44.

Jun. 6—Transcript of hearing 5/22/44 filed.

Jul. 1—Brief filed by taxpayer. Served 7/5/44.

Jul. 5—Memorandum brief filed by General Counsel. Served 7/5/44.

Dec. 5—Memorandum findings of fact and opinion rendered Judge Arundell. Decision will be entered under Rule 50. Copies served 12/6/44.

1945

Jan. 4—Application to introduce additional evidence filed by taxpayer. 1/4/44 Denied.

Jan. 9—Computation of deficiency filed by General Counsel. (No objection.)

Jan. 11—Decision entered. Judge Arundell. Div. 7.

Apr. 4—Petition for review by U. S. Circuit Court of Appeals, 3d Circuit, filed by General Counsel.

Apr. 4—Notice of filing petition for review on Attorney for taxpayer, filed.

Apr. 13—Proof of service on Edward E. Black, Executor, filed.

May 10—Motion for extension of time to 7/3/45 to prepare and transmit the record filed by General Counsel.

May 10—Order enlarging time to 7/3/45 to prepare and transmit record entered.

Jun. 18—Designation of portions of record, proceedings and evidence to be contained in record on review filed by General Counsel with proof of service thereon.

Jun. 18—Statement of points filed by General Counsel with proof of service thereon.

Jun. 18—Designation of additional portions of record filed by taxpayer with proof of service thereon.

* * * * *

15 In the Tax Court of the United States

Docket No. 3489

EST. OF FRANCOIS L. CHURCH, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Report of proceedings

Filed June 16, 1944

Hearing at New York, N. Y. Date May 22, 1944.

* * * * *

23 E. D. CHURCH, called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

* * * * *

31 Q. At the time the decedent established this trust, did he have any brothers and sisters by the whole blood?

A. Yes.

Q. How many?

A. He had one sister and one brother.

32 Q. Did they have any children at that time, Mr. Church?

A. No.

Q. Did the decedent have any children at the time he established the trust?

A. No.

Q. Was he married at that time?

A. No.

Q. How many half brothers and sisters did the decedent have?

A. He had four half brothers.

Q. Did they have any children on May 17, 1924?

A. Yes.

Q. How many children did they have?
A. Seven.
Q. Do you recall the date of the decedent's death?
A. Of the decedent's death?
Q. Yes.
A. It was in December 1939.
Q. At that time did he have any children?
A. No.
Q. Did his brother and sister by the whole blood have any children?
A. Yes.
33 Q. How many?
A. His brother had two and his sister one.
Q. And were that brother and sister themselves alive at the time of the——
A. They were.
Q. At the time of the decedent's death?
A. Yes.
Q. Were the four half brothers of the decedent alive at the time of his death?
A. Yes.
Q. Were the seven children of the four half brothers alive at the time of the decedent's death?
A. Yes.

* * * * *

34 Q. Will you tell us what you said and what he said at that conversation?
A. I called his attention to the fact that for some time he had been, as I put it, squandering money. He had been squandering money and he took up—I took up one specific case where there was a deposit made for his account of $5,000 in the Corn Exchange Bank up on Broadway near 72nd Street. That was put in on March 24th or 26th—24th, I think it was, and it was called to my attention by one of the officers of the Corn Exchange Bank that they felt things were not just as they should be and
35 I saw the withdrawals that had been taken from that account and by April 19, he had checked out over $4,000. A good deal of that was in the shape of cash; some were drawn to his own account and others were drawn to people that I recognized as being dressmakers. There was Saks and Gimbels and also a check drawn to a man that he had become acquainted with which was hardly a reputable person and I noticed that there were several checks or two checks at least that had been drawn to him during that time.
I was—I spoke to him about it and told him that at that rate he certainly was squandering his money and that I knew that he

had been going with a woman of not good reputation, at least, and spending money and giving her money. Also, that he had at times taken too much in the way of drink. You might say, it didn't take much to make him lose his—to know what he was doing. I called his attention to all these things and I also particularly—which I was more interested in than anything else, was to safeguard to whom his stock in the Church & Dwight Co. might evenfually go to. I was somewhat disturbed in the situation as it stood and I told him that the Church & Dwight Co. stock was probably the most valuable asset that he had in
36 his estate and that inasmuch as the stock was very closely held, practically entirely by members of the family—one of the Church family and one of the Dwight family—that I thought it was proper for him to take some steps to safeguard that and suggested that he put that stock in trust.

I might also say right here that he did make it over to me—he wanted to make it over to me, which of course, I wouldn't accept under any conditions and from the office, he went, I presume, to see Mr. Dwight. He had been our attorney for the company and for the family for years and Mr. Dwight drew the Exhibit No. 1.

* * * * *

53 *Petitioner's Exhibit No. 1*

This Indenture made the 17th day of May, 1924, between Francois L. Church, of the Borough of Brooklyn, City and State of New York (hereinafter sometimes called the "Settlor"), party of the first part, and Francois L. Church and E. Dwight Church, of the Borough of Brooklyn, city and State of New York, and Charles T. Church, of New Rochelle, New York (hereinafter sometimes called the "Trustees"), parties of the second part.

Whereas the said Francois L. Church is desirous of making provision for any lawful issue which he may leave at the time of his death as well as provide an income for himself for life in the manner hereinafter set forth,

Now, therefore, the said Francois L. Church, in consideration of the sum of One Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and the acceptance by said parties of the second part of the trust herein declared, has simultaneously with the execution and delivery hereof, sold, assigned, transferred and set over and does hereby sell, assign, transfer and set over unto the said Francois L. Church, E. Dwight Church and Charles T. Church as Trustees, and to their successors, the following securities, to wit:

One thousand (1000) shares of stock of Church & Dwight Co., a corporation organized under the laws of Maine.

To have and to hold the same, together with the moneys and investments into which in the exercise of any power hereinafter given to the trustees or by law vested in them, the
54 said described securities or the proceeds thereof and such moneys may from time to time be converted in trust nevertheless to hold, manage, invest and reinvest the said trust estate upon the trust herein contained and with the powers herein or by law conferred upon the trustees, and to collect and receive the income accruing therefrom and after paying from said income all charges and expenses properly chargeable against the income of said trust estate to pay over the net income to the Settlor, Francois L. Church, during the term of his natural life and upon the death of the Settlor this trust shall cease and determine and the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist, to the child or children of the Settlor then surviving the issue of any deceased child or children to take the share per stirpes which their parent would have been entitled to receive if living.

In the event that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living.

55 The Trustees with respect to such trust are hereby authorized and empowered:

(1) To retain the trust estate during the continuance of the trust in the same investment in which it was received by them without being liable to account for any resulting loss;

(2) To sell at public or private sale upon such terms and for such price or prices and at such time or times and together or in such lots or parcels as the Trustees may think proper the securities held by them in the trust; but no such sale or sales shall be made by the trustees without the consent first obtained of the Settlor;

Likewise in the event of a sale the proceeds of such sale shall be reinvested by the trustees without unnecessary delay in securities approved by the Settlor or in default of such approval in securities authorized for investment by Trustees by the laws of the State of New York;

(3) To compromise any claim or claims that may at any time arise with reference to the trust estate or any property or security forming a part thereof;

(4). To exchange any of the trust securities for other securities in connection with any reorganization of Church & Dwight Company or any other company or companies issuing securities then belonging to the trust;

56 (5) To vote upon stock, directly or by proxy, in any manner and to the same extent as if the trustees held the shares in their own right, including the power to vote in favor of consolidating or merging corporations into or with each other or into or with other corporations, for the dissolution or liquidation of corporations, the creating or authorization of indebtedness, mortgages and other liens and for the organization or reorganization of corporations and to deposit securities with any reorganization committee or protection committee of any corporation.

(6) To apportion in their uncontrolled discretion as between income and principal as the trustees may deem proper, any losses or profits resulting from the increase or decrease in the value of the securities or property which may at any time form a part of the trust estate, and also so to apportion the income of the trust estate, and any loss in said income and any proceeds received upon account of income, whether by way of interest, dividends, stock dividends or by way of the distribution of cash, bonds, debentures, stocks or other securities by corporations whose stocks or securities may at any time form a part of the principal of the trust estate or otherwise, and also similarly to apportion expenses incurred in the administration of said trust or in connection with the realization upon any of said securities or property;

57 (7) To employ counsel or attorneys at law in connection with the administration of the trust if in their discretion the Trustees deem it necessary or desirable and to pay them reasonable compensation for their services as an expense of the administration of said trust.

In the event that any of the Trustees should resign or for any other reason cease to be a trustee such vacancy shall be filled by the appointment of a successor trustee in writing by the Settlor.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

FRANCIS L. CHURCH,
Settlor.

FRANCIS L. CHURCH,
E. DWIGHT CHURCH,
CHARLES T. CHURCH,
Trustees.

70 In the Tax Court of the United States

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 3489

Decedent in 1924 established a trust to pay the income to himself for life, and at his death the corpus to be distributed to his surviving issue, or in default thereof, to his brothers and sisters in equal shares, any child or children of a deceased brother or sister to take the share allocated to the parent, per stirpes. Decedent was survived by a brother of the full blood with two children, a sister of the full blood with one child, and four half-brothers with seven children. Held, the corpus of the trust is not includible in the estate of the decedent under section 302 (c) of the Revenue Act of 1926, as amended, as a transfer intended to take effect in possession or enjoyment at or after death.

William W. Owens, Esq., for the petitioner.

Robert S. Garnett, Esq., for the respondent.

Memorandum findings of fact and opinion

December 5, 1944

This proceeding involves a deficiency in estate taxes in the amount of $49,410.30. Three errors were alleged: (1) The inclusion in the gross estate of decedent of the principal of
71 a trust established by him on or about May 17, 1924; (2) the valuation of the principal of the above estate; and (3) the failure of the Commissioner to allow credit for state estate taxes. The second issue has been abandoned by petitioner. As to the third issue the amount of the New Jersey estate tax is dependent upon the outcome of this litigation and counsel have agreed that proof of payment may be submitted upon determination of this proceeding.

FINDINGS OF FACT

Petitioner is the Estate of Francois L. Church, who was at the time of his death, December 11, 1939, a resident of the State of New Jersey. The estate tax return was filed with the Collector of Internal Revenue for the fifth district of New Jersey, on March 10, 1941.

By deed of trust, dated May 17, 1924, decedent transferred to himself, E. Dwight Church, and Charles T. Church, 1,000 shares of stock of Church & Dwight Co., in trust for the purposes and upon the terms hereinafter described. The instrument was executed and delivered in the State of New York, in which state decedent continuously resided until his removal to New Jersey in 1937. E. Dwight Church and Charles T. Church, brothers of the half-blood of decedent, have at all times here material continually resided in the State of New York. The shares constituting the corpus of the trust and the bank account of the trust have been physically located in New York.

At the time of the creation of the trust, decedent had but recently attained his 21st birthday, whereupon there was delivered to him property of substantial value which had theretofore been held and managed for him by his mother. The principal
72 asset of the estate consisted of 1,000 shares of the stock of Church & Dwight Company, a corporation closely held by the Church and Dwight families. In march 1924, it came to the attention of E. Dwight Church that decedent was leading a rather riotous existence, drinking heavily, squandering his money, and associating with companions of questionable repute. Fearful that decedent, as a result of his improvidence, might dispose of the 1,000 shares of Church & Dwight stock to persons outside the family circle, E. Dwight Church suggested to decedent that he place the stock in trust in order to safeguard it and to assure decedent an income for his life. Following this suggestion, decedent established the trust above mentioned. The trust indenture provided that the income should be paid to decedent for life and upon his death the trust should terminate and the corpus be distributed to his issue then surviving. The trust instrument further provided as follows:

"In the event that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have entitled to receive if living."

No power to alter, amend, or revoke was reserved by the grantor.

On May 17, 1924, the date of the creation of the trust, decedent had one brother and one sister of the full blood and four half-brothers. On that date there were living seven children of the brothers of the half-blood. Decedent was then unmarried and had no childrens At death he was survived by his brother of the whole blood, who had two children then living; his sister of

the whole blood, who had one child then living; and his four half-brothers, who had seven children then living.

73 The gift in trust was not made in contemplation of death.

Respondent determined that the corpus of the trust was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

OPINION

ARUNDELL, Judge: The only point at issue is whether or not the value of the corpus of this trust is includible in decedent's estate under the provisions of section 302 (c) of the Revenue Act of 1926, as amended, as a transfer "intended to take effect in possession or enjoyment at or after his death." It is clear that the reservation of a right to the income of the trust for life is not a sufficient basis for including the trust corpus in decedent's estate, for the reason that the trust was created prior to the effective date of the Joint Resolution of March 3, 1931, amending section 302 (c) of the Revenue Act of 1926. May v. Heiner, 281 U. S. 238; Hassett v. Welch, 303 U. S. 303; Estate of Edward E. Bradley, 1 T. C. 518, affirmed sub nom. Helvering v. Washington Trust Co., 140 Fed. (2d) 87; Estate of James H. Matthews, 3 T. C. 525.

Respondent relies upon the unglossed principle of Helvering v. Hallock, 309 U. S. 106. We think, however, that this is not a case within the rule of the Hallock case. The trust indenture directed that upon the death of the grantor the corpus was to be distributed to his surviving child or children, or to the issue of any deceased child or children, per stirpes; and in the event the grantor should die without issue surviving, then to his brothers and sisters, or to the child or children of any deceased brother or sister, per stirpes. At the time of his death he

74 had no issue surviving, but there were living his brother with two children, his sister with one child, and his four half-brothers with seven children. Decedent reserved no power to alter, amend, or revoke, nor did he expressly reserve any possibility of reverter. The mere possibility of reverter by operation of law upon a failure of the trust, due to the death of all the remaindermen prior to the death of decedent, is not such a possibility as to come within the Hallock case. Estate of Joseph K. Cass, 3 T. C. 562; Commissioner v. Kellogg, 119 Fed. (2d) 54, affirming 40 B. T. A. 916; Estate of Henry S. Downe, 2 T. C. 967; Estate of Mabel H. Houghton, 2 T. C. 871; Estate of Ellen Portia Conger Goodyear, 2 T. C. 885; Estate of Charles Delany, 1 T. C. 781. (Affirmed without written opinion CCA 2, April 20, 1944.)

Here, as in Commissioner v. Kellogg, supra, "* * * the fact of importance in the case at bar is that the grantor during his

lifetime disposed of his interests in the corpus of the trust as well as any man could." No interest in the property passed from decedent to the remaindermen at his death. His death served merely to "obliterate" the interest possessed by him immediately prior to his death. May v. Heiner, supra; Reinecke v. Northern Trust Co., 278 U. S. 339. It is clear, therefore, that no part of the corpus of the trust is includible in the estate of the decedent as a transfer "intended to take effect in possession or enjoyment at or after his death."

Enter:

Entered December 5, 1944.

Decision will be entered under Rule 50.

75 The Tax Court of the United States

[File Endorsement Omitted.]

[Title omitted.]

Denied. Jan. 4, 1945. (Signed) C. R. Arundell, Judge.

Application to introduce additional evidence

Filed Jan. 4, 1945

To the Honorable Judges of the Tax Court of the United States:

The above proceeding involved an asserted deficiency in federal estate tax. It was tried before this Court, Judge Arundell, presiding, in the city of New York, on May 22, 1944. The only issue raised by the petition was whether a certain trust established by the decedent in 1924 was includible in the gross estate. Under the terms of the trust the decedent was to receive the income for life and the remainder was to go to his issue. On default of issue the remainder was to go to the surviving brothers and sisters of the settlor and to the surviving children of any brother or sister who should predecease settlor. The settlor died in 1939 without issue but leaving sixteen brothers, sisters, nephews, and nieces, ten of whom were younger than the settlor.

76 The respondent's main contention, as outlined in his brief, was that if the settlor had died without issue, brothers, sisters, nephews, or nieces the corpus would, by operation of law, have reverted to his estate and that this possibility of reverter made the trust includible in the gross estate.

The opinion of this Court in favor of petitioner was entered on December 5, 1944. In that opinion the Court held, among other things, that the mere possibility of reverter by operation of law due to the death of all the remaindermen prior to the death

of the settlor was not such a possibility as to come within the Hallock case. As the Court pointed out, this was in accordance with a long line of authority. However, the United States Court of Claims on November 6, 1944, decided Central Hanover Bank & Trust Co. v. United States, 57 F. Supp. 497, which appears to hold that such a remote possibility of reverter by operation of law makes the corpus of a trust includible in the gross estate of the settlor. The respondent, now having a conflict of authority, may be expected to seek to carry the question to the Supreme Court of the United States. Out of an abundance of caution I desire to reopen the proceedings in this case so as to introduce testimony showing that the cash value of this reversion by operation of law was less than one cent, for the Supreme Court
77 might hold that the reversion was taxable and in such event there would be a serious miscarriage of justice if petitioner, because he had failed to prove the value of the reversion, was compelled to include the entire corpus of the trust in the gross estate.

At the close of the trial the trial judge suggested that I might desire to introduce such testimony and I informed him that I had failed to do so because under my interpretation of the previous decisions of this Court it was unnecessary. I did, however, ask for a few days adjournment so that I might bring in an actuary to give such testimony but the Court was unwilling to do this and said it would consider the case as closed. However, the Central Hanover Bank decision has completely altered the complexion of the matter and I therefore ask that the Court now reconsider such application and permit me to introduce the proffered testimony. To show that this application is made in good faith there are annexed hereto the affidavits of E. D. Church and Jonathan G. Sharp showing precisely what such testimony will amount to. Possibly respondent would be willing to concede the accuracy of Mr. Sharp's computations and to permit the receipt of the annexed affidavits in lieu of taking testimony in open Court, for the computations are scarcely matters on which actuaries would disagree. If respondent does not make such concession, however, I am prepared, if the Court will permit me
78 to do so, to make the proof in the usual manner in open court.

Wherefore I respectfully request that the Court reopen these proceedings in order to take testimony concerning the actuarial value of the reversion, if any exists, by operation of law.

William W. Owens,
WILLIAM W. OWENS,
Counsel for Petitioner.

Dated: January 2, 1945.

[Title omitted.]

Affidavit of Jonathan G. Sharp

Jonathan G. Sharp, being duly sworn, deposes and says:

I am a consulting actuary and a member of the firm of Woodward, Ryan, Sharp & Davis who are consulting actuaries located at 41 Park Row, New York City. I studied actuarial science at Toronto University from 1911 to 1914. After the first World War I completed my course and took my degree at that university. Thereafter I became associated with the Metropolitan Life Insurance Company of New York City and was engaged in research work in their Actuarial Department until 1925. I became a fellow of the Actuarial Society of America in 1925 and in 1927 I became a member of the actuarial firm of Woodward, Fodiller & Ryan, the predecessor of my present firm. Upon Mr. Woodward's death in 1928 I was placed in charge of life insurance
80 and general actuarial analysis. I have been head of the firm since that time.

I have advised most of the leading life insurance companies of the United States and a number of private firms and individuals in connection with actuarial matters. Among the clients of our firm, for whom I have done actuarial work, are the New York Life Insurance Company, the Mutual Benefit Life Insurance Company, the Prudential Life Insurance Company and the American Telephone & Telegraph Company. Much of our work for insurance companies if of a research nature devoted to the development of new methods in actuarial work in connection with pensions based upon life expectancies. I have testified as an expert witness in the Tax Court of the United States in actuarial matters on at least two occasions.

I have been asked by Mr. William W. Owens, an attorney of New York City, to assume:

1. That on or about May 7, 1924, Francois L. Church set up a trust to pay the income to himself for life with remainder to his issue but, in default of issue, in equal shares to his brothers and sisters who survived him, with any child or children of a deceased brother or sister to take the share which their parent would have been entitled to receive if surviving him.

81 2. That half brothers of Francois L. Church, and their children, share in the trust to the same extent as whole brothers and their children.

3. That the facts set forth in the annexed affidavit of E. D. Church sworn to January 2, 1945, are correct.

4. That Francois L. Church never had any issue.

5. That the value of the property in the trust on December 11, 1939 was $188,800.

6. That if Francois L. Church had not died on December 11, 1939, the value of the property in the trust would have continued to be $188,800 until the date of his death.

7. That Francois L. Church did not die on December 11, 1939, was in good health on that day and, on that day, had a normal life expectancy.

8. That if Francois L. Church died without issue surviving him and without surviving brothers and sisters and without surviving children of brothers or sisters the corpus of the trust would have constituted part of the estate of Francois L. Church.

On the basis of the foregoing assumptions I have been asked to determine the value as of December 11, 1939,
82 immediately prior to the death of Francois L. Church, of the possibility of the corpus going into his estate by reason of the fact that he would survive the sixteen brothers, sisters, nephews, and nieces mentioned in the annexed affidavit of E. D. Church. In making this computation I have been directed to use the Actuaries' or Combined Table of Mortality with interest at 4% per annum.

I have made the computations and I find that the value, as of December 11, 1939, immediately prior to the death of Francois L. Church, of the possibility of the corpus going into his estate by reason of the fact that he would survive the sixteen brothers, sisters, nephews, and nieces is less than three-ten thousandths of one cent. I have also made a quick computation by the use of other actuarial tables, including (but without thereby limiting the generality of this statement) the American Experience Table and the American Men Table, and I find that regardless of which of those tables I use the value as of December 11, 1939, immediately prior to the death of Francois L. Church, of the possibility of the corpus going into his estate by reason of the fact that he would survive the sixteen brothers, sisters, nephews, and nieces is less than one cent. In all such computations I have assumed that Francois L. Church, instead of dying on December 11, 1939, would live a normal span of life.

83 I am prepared to testify to the foregoing results in this Court under oath and to submit to cross-examination thereon.

JONATHAN G. SHARP,
Fellow of the Actuarial Society of America.

Sworn to before me this 2nd day of January 1945.

George H. Prescott,
[SEAL] GEO. H. PRESCOTT,
Notary Public, Queens County.

Certificate filed in Queens Co. No. 1653. Queens Co. Register's Off. No. 41–P–6. Cert. filed in N. Y. Co. No. 118. Cert. filed in N. Y. Reg. Off. No. 72–P–6. Cert. filed Kings Co. No. 78. Cert. filed Kings Co. Reg. Off. 120–P–6.

Commission Expires March 30, 1946.

84 In the Tax Court of the United States

[Title omitted.]

Affidavit of E. D. Church

E. D. Church, being duly sworn, deposes and says:

I am a half brother of the decedent, Francois L. Church, who died on December 11, 1939. He was born on September 30, 1902. The following brothers, sisters, nephews, and nieces of the whole and half blood survived Francois L. Church:

Name	Relation	Date of birth
James S. Church	Brother	Apr. 27, 1906
2 children	Judith Ann	Jan. 22, 1934
	Susan Louise	Apr. 15, 1937
Nancy Church Turcott	Sister	Feb. 7, 1904
1 child	Nancy Louise	May 31, 1931
Frederic E. Church	Half-brother	Oct. 25, 1876
3 children	Nancy C. Seegers	Mar. 16, 1915
	Charlotte C. Schroeder	Dec. 18, 1902
	Chas. T. Church II	Aug. 24, 1920
85 Charles T. Church	Half-brother	Feb. 17, 1879
No children.		
E. D. Church	Half-brother	Feb. 24, 1907
2 children	Marjory C. Logan	Apr. 30, 1894
	Helen C. Minton	Nov. 19, 1899
Austin Church	Half-brother	Dec. 15, 1871
2 children	Helen C. Towle	Apr. 13, 1904
	Austin Dwight Church	Mar. 20, 1909

E. D. CHURCH.

Sworn to before me this 2nd day of January 1945.

[SEAL] WILLIAM H. BROADHURST,
Notary Public, Suffolk County.

Certificates filed in New York County. Clerk's No. 111. Register's No. 75–B–5.

Commission expires March 30, 1945.

86 In the Tax Court of the United States, Washington

Docket No. 3489

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the Court's Memorandum Findings of Fact and Opinion entered December 5, 1944; the parties having filed an agreed recomputation of tax on January 9, 1945, it is

Ordered and decided: That there is a deficiency in estate tax of $6,999.38.

Enter:

[SEAL] (S) C. R. ARUNDELL, *Judge.*

Entered Jan. 11, 1945.

Copies served on both parties.

* * * * * *

98 In the United States Circuit Court of Appeals
for the Third Circuit

No. 8993. October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

Minute entry

Jan. 9, 1946

And afterwards, to wit, 9th day of January 1946, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin, and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order setting cause for reargument

Filed April 17, 1946

Present: GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges.

It is hereby ordered that the above entitled case be scheduled for reargument before the Court en banc on Monday, May 6, 1946.

By the Court.

JNO. J. O'CONNELL, *Circuit Judge.*

[File endorsement omitted.]

99 United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Amended order

Filed April 24, 1946

Present: GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges.

The order heretofore entered in the above entitled case scheduling reargument before the court en banc on Monday, May 6, 1946, is hereby revised and amended so as to substitute Friday, May 10, 1946, for Monday, May 6, 1946.

By the Court,

JNO. J. O'CONNELL, *Circuit Judge.*

[File endorsement omitted.]

In the United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry

May 10, 1946

And afterwards, to wit, 10th day of May 1946, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable Herbert F. Goodrich, Honorable Gerald McLaughlin, and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 17th day of March 1947, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

100 In United States Circuit Court of Appeals for the Third Circuit

No. 8993. October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

Argued January 9, 1946. Reargued May 10, 1946

Before BIGGS, MARIS, GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges

Opinion of the court

Filed March 17, 1947

By BIGGS, Circuit Judge: The question presented by the case at bar is whether a transfer of property in trust made by the decedent, Church, in his lifetime is includible in his gross estate for the purpose of imposition of estate tax. See Section 811 (c) of the Internal Revenue Code, 26 U. S. C. A. § 811 (c), Section 302 (c) of the Revenue Act of 1926 as amended, 44 Stat. 70. The trust indenture, executed by Church on May 17, 1924, provided that the income from the trust should be paid to him during life, that on his death the trust should terminate, the corpus to be distributed to his issue then surviving; that in the event he should have no lawful issue surviving the principal amount of the trust with any increment should be paid in equal shares to his brothers and sisters then surviving, any child or children of a deceased brother or sister to take the share per stirpes which the parent would have been entitled to receive if living. No power to amend, alter or revoke the trust was reserved by Church. On the date of the creation of the trust he had one brother and one sister of the full blood and four half-brothers. There were then living seven children of the brothers of the half-blood. Church was then unmarried and had no children. At his death he was survived by his brother of the whole blood who had two children who were then living; by his sister of the whole blood who had one child then living; and by his four half-brothers, who had seven children then living.

101 The Commissioner took the position that the corpus of the trust was includible in the decedent's gross estate. The Tax Court overruled the Commissioner's determination and he appealed.

We think that the decision of the Tax Court must be affirmed. The issue presented seems to be one reserved to the determination of the Tax Court by the decisions of the Supreme Court in Dobson v. Commissioner, 320 U. S. 489; in Wilmington Trust Company v. Helvering, 316 U. S. 164, and in later very pertinent decisions. We cannot "identify a clear-cut mistake of law * * *" in the Tax Court's decision in the case at bar. See the Dobson case supra, at pp. 501–502. In Equitable Life Assurance Society v. Commissioner, 321 U. S. 560, the Supreme Court stated that it was not its task to draw inferences from facts or to supplement stipulated facts, that function resting with the Tax Court. The Supreme Court said that it could modify or reverse the decision of the Tax Court only if that tribunal's determination was "not in accordance with law." Assuredly the function referred to does not lie in this court.

In Commissioner v. Scottish American Co., 323 U. S. 119, 122, the Supreme Court reversed us, stating that the Tax Court drew certain inferences and conclusions which we could not overrule since there was no clear-cut mistake of law. Mr. Justice Murphy laid emphasis upon the validity of factual patterns as found by the Tax Court saying, id at p. 125, "The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should thus be given wide range in such proceedings." In Choate v. Commissioner, 324 U. S. 1, the Supreme Court placed emphasis upon the right of the Tax Court to weigh the legal effect of documentary evidence and in effect admonished the Circuit Courts of Appeals that the legal effect of the transactions as found by the Tax Court generally should not be disturbed. In Trust of Bingham v. Commissioner, 325 U. S. 365, 370–371, it was said that even if "clear-cut questions of law" were presented the Tax Court's decision was entitled to great weight and that reviewing courts may set aside a decision of the Tax Court only when it announces a rule of general applicability which falls short of meeting statutory requirements. In this connection emphasis was laid on the fact that the Tax Court in general decided each case on a particular pattern of circumstances. In Kelley Co. v. Commissioner and Talbot Mills v. Commissioner, 326 U. S. 521, this doctrine seemingly was reiterated.

In the light of the foregoing decisions we think that we may not set aside the finding of the Tax Court in the instant case that "* * * no part of the corpus of the trust is includible in the

estate of the decedent as a transfer 'intended to take effect
102 in possession or enjoyment at or after his death.'" Accordingly the decision of the Tax Court will be affirmed.

Dissenting opinion

O'CONNELL, Circuit Judge, Dissenting.

The basis of the majority opinion is that no clear-cut mistake of law on the part of the Tax Court can be identified; consequently, under the Dobson doctrine, this court is without power to reverse the Tax Court decision. I agree that the review function of this court has been limited to clear-cut mistakes of law; but I respectfully dissent from the pronouncement that the case at bar does not fit that description.

There was no contest as to the facts, nor as to the inferences drawn by the Tax Court. In a trust created prior to March 3, 1931, the decedent reserved a life estate in the income, and, according to the Tax Court, "disposed of his interests in the corpus as well as any man could."[1] The fact remains, however, that, by operation of law, a reversionary interest in favor of decedent did exist.[2] The sole question decided by the Tax Court was whether that reversionary interest brought this case within the principle of May v. Heiner, 281 U. S. 238 (1930), or that of Helvering v. Hallock, 309 U. S. 106 (1940). In short, the issue was: Should an estate tax be imposed on the entire corpus because a reversionary interest created by law was coupled with a life estate? It seems to me that even a cursory reading of the Tax Court opinion establishes that the Tax Court treated this as a pure question of law. Indeed, I consider the conclusion irresistible that the issue could be treated in no other way. As I analyze this case, therefore, it was incumbent upon this court to decide whether the Tax Court correctly decided a purely legal question.

At the outset, it should be noted that the Tax Court disposed of this case before three highly important decisions of the Supreme Court were rendered: Fidelity Co. v. Rothensies, 324 U. S. 108 (1945); Commissioner v. Estate of Field, 324 U. S. 113 (1945); and Goldstone v. United States, 325 U. S. 687 (1945).[3] Although

[1] But see Beach v. Busey, 156 F. 2d 496 (C. C. A. 6, 1946, affirming District Court); cert. den., January 6, 1947. An interesting feature of Beach v. Busey is that, unlike the case at bar, the settlor made a gift over to his "heirs," also designated as "lineal descendants." Clearly, the settlor in that case attempted to dispose of his interest in the corpus. The Supreme Court nevertheless denied certiorari of a decision taxing the corpus of the trust to the settlor, because of the reversionary interest created by operation of law.

[2] Appellee faintly suggests that, under the law of New York, decedent had no reversionary interest. The fundamental rule, however, is that a clear expression of purpose is required to divest the settlor of a reversionary interest, even though the trust is to continue until the death of the reversioner. See Doctor v. Hughes, 225 N. Y. 305, 311 (1919).

[3] The Tax Court decision was entered December 5, 1944, exactly two months before the Fidelity Co. and Field decisions.

those rulings apparently have not changed the position of the Tax Court,[4] they have been the basis of a contrary ruling by
168 four Circuit Courts of Appeals,[5] and constitute the prime reliance of appellant in this case. Consequently, the majority opinion places this court squarely in conflict with the position taken by four other circuit courts.

It seems to me the majority holding is susceptible of only two explanations: either it is felt that, notwithstanding the fact that the question is purely one of law, the Dobson doctrine forbids review unless the error of the Tax Court is beyond doubt; or the majority believes that, on the merits, the Tax Court reached the proper conclusion.

The difficulty I have with the former explanation is that, theoretically at least, once the facts are established there can be only one correct governing principle of law. While the interpretation of the Tax Court may and should be given "great weight" in determining that principle, can it be unequivocally stated that such determination of the legal question by the Tax Court does not warrant appellate scrutiny, where four circuit courts have endorsed a contrary interpretation on virtually identical facts, and the Tax Court itself has decided a similar case in favor of the imposition of the tax?[6]

The second explanation, that the Tax Court was correct on the merits, likewise is subject to penetrating analysis. Such explanation requires strained mental gyrations to remove the instant case from the language of the three Supreme Court decisions.[7] It permits radically different tax results to stem from reversionary interests which are equally remote and unlikely, dependent upon the happenstance of whether or not the settlor ignored the reality that in the eyes of the law he had not released his entire interest in the corpus. It looks away from the fact that decedent, in a formal instrument, has created a trust under the provisions of which an interest retained by him, however remote it may be, is in fact transferred at his death. Finally, it sanctions an extension of the doctrine enunciated in May v. Heiner, supra, which case has been cited by the Supreme Court only twice since Helvering v. Hallock, supra.[8]

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[4] Estate of Edward P. Hughes, 7 T. C. No. 157, promulgated December 16, 1946.

[5] Commissioner v. Bank of California, 155 F. 2d 1 (C. C. A. 9, 1946, reversing Tax Court); Commissioner v. Bayne's Estate, 155 F. 2d 475 (C. C. A. 2, 1946, reversing Tax Court); Beach v. Busey, 156 F. 2d 496 (C. C. A. 6, 1946, affirming District Court), cert. denied, January 6, 1947; Thomas v. Graham, — F. 2d — (C. C. A. 5, decided December 12, 1946, reversing District Court).

[6] Estate of Thomas P. Leaman, 5 T. C. 699 (1945).

[7] See particularly Commissioner v. Estate of Field, 324 U. S. 113 at 116 (1945).

[8] The two occasions were in the concurring opinions of Mr. Justice Douglas in Fidelity Co. v. Rothensies, 324 U. S. 108 (1945), and Commissioner v. Estate of Field, 324 U. S. 113 (1945). He said that the Supreme Court, in those cases, was not required to determine "whether the rule of May v. Heiner should survive Helvering v. Hallock." On the other hand, the Supreme Court has cited Helvering v. Hallock frequently.

It is appropriate at this point to stress that to support the decision of the Tax Court, it must be assumed that May v. Heiner still retains its orginal vigor, and that the Hallock doctrine
104 has not sounded its elegy. It is not my intent to review the volumes which have been written about May v. Heiner. It is sufficient to note that comment has been almost universally adverse;[9] and that, one day after May v. Heiner was cited as controlling decision of three similar cases, the congressional intent was clearly established in an unanimous Joint Resolution specifically imposing an estate tax upon trusts of this nature.

I find no difficulty in applying the Hallock doctrine to this case. We are told that "the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes inter vivos transfers that are too much akin to testamentary dispositions not to be subjected to the same excise."[10] We need not concern ourselves with the casuistries of distinctions between contingent and vested remainders subject to divestment,[11] nor with testing the flimsiness of a reversionary string retained by the settlor.[12] In the case at bar, the corpus was to be distributed only to beneficiaries who survived the decedent. Since decedent might survive all designated beneficiaries, there was the possibiltiy that the gift of the corpus would fail, for want of beneficiaries. He did not eliminate this possibility by an unconditional gift over. The string has exactly the same characteristics as though he had expressly reserved it. Why, pragmatically, should not the same legal effect be accorded? Is not the salient conclusion that there existed in the possession of decedent a reversionary interest which, until his death, delayed determination of ultimate possession of the corpus?

The practical effects of the majority opinion, it seems to me, can lead only to further confusion on the scope of the Dobson doctrine. As indicated above, the Tax Court, in Estate of Edward P. Hughes, supra, chose to adhere to its own interpretation of the three Supreme Court decisions. In so doing, the Tax Court specifically rejected the interpretation of the Second Circuit Court. Surely the Dobson doctrine cannot and should not be extended to the anomalous situation where circuit courts must accept Tax Court interpretations of law, even if such interpretations are at variance with their own.

Some controversy exists as to whether the current impasse will be resolved by the Administrative Procedure Act.[13] If the Tax Court

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[9] For an excellent discussion, see Paul, Federal Estate and Gift Taxation, 1946 Supplement, c. 7, § 7.15.
[10] Helvering v. Hallock, 309 U. S. 106, 112 (1940). See also Goldstone v. United States, 325 U. S. 687, 690 (1945).
[11] Helvering v. Hallock, 309 U. S. 106 (1940).
[12] See Fidelity Co. v. Rothensies, 324 U. S. 108 (1945).
[13] P. L. 404, 79th Congress, approved June 11, 1946.

is an "agency," and if it is subject to Section 10 of the Act, the difficulties encountered under the Dobson doctrine will be eliminated; for, under the Act, the appellate jurisdiction of this
105 court is to include not only decision of all relevant questions of law; but also the power to set aside conclusions and findings unsupported by substantial evidence. In any event, it is my opinion that the Dobson doctrine has not so distrained this court as—to borrow a phrase uttered by Judge Frank in a recent dissenting opinion [14]—to bar judicial scrutiny whenever the Tax Court has ceremoniously woosh-wooshed.

For the reasons stated, I believe the decision of the Tax Court should be reversed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit

No. 8993. October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

Present: BIGGS, MARIS, GOODRICH, MCLAUGHLIN, and O'CONNELL, Circuit Judges.

Judgment

Filed March 17, 1947

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

By the Court,

BIGGS, *Circuit Judge.*

MARCH 17, 1947.

[14] Old Colony Bondholders v. N. Y., N. H., & H. Railroad Co., — F. 2d — (C. C. A. 2, decided January 13, 1947.

[File endorsement omitted.]

106 [Clerk's certificate to foregoing transcript omitted in printing.]

In the Supreme Court of the United States

[Title omitted.]

Stipulation as to record

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the purpose of the petition for a writ of certiorari the printed record may consist of the following:

(1) The appendix to the Petitioner's brief in the United States Circuit Court of Appeals for the Third Circuit.

(2) The appendix to the Respondent's brief in the United States Circuit Court of Appeals for the Third Circuit.

(3) The proceedings had before the United States Circuit Court of Appeals for the Third Circuit.

It is further stipulated and agreed that Petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Third Circuit to file with the Clerk of the Supreme Court the entire transcript of record in his court, and that in the event that the Petition for Writ of Certiorari be granted, the printed record shall consist of the proceedings in the court below, and such
107 portions of the entire transcript of record as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in their briefs to the original record filed in the Supreme Court of the United States.

GEORGE T. WASHINGTON,
Acting Solicitor General of the United States,
Attorney for Petitioner.

WILLIAMS W. OWENS,
Attorney for Respondent.

Dated this 5th day of May 1947.

107 In the Supreme Court of the United States

[Title omitted.]

Stipulation as to printed record

(Filed Aug. 21, 1947)

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties

hereto that, for purposes of the writ of certiorari, the printed record shall consist of the following:

1. Those portions of the transcript of record on file in the office of the clerk of this Court which are contained in the printed transcript of record used for the purposes of the petition for writ of certiorari herein.

2. This stipulation.

It is further agreed that in the briefs for either party reference may be made to any portions of the transcript of record which is not included in the printed record.

GEORGE T. WASHINGTON,
Acting Solicitor General of the United States,
Counsel for Petitioner.
WILLIAM W. OWENS,
Counsel for Respondent.

Dated this 25th day of July 1947.

108 Supreme Court of the United States

Order allowing certiorari

Filed June 16, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 1144, Spiegel et al. vs. Commissioner of Internal Revenue.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 20 1947
CHARLES ELMORE CROPLEY
CLERK

No. 1395

In the Supreme Court of the United States

OCTOBER TERM, 1946

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

Cases:

Commissioner v. *Bank of California*, 155 F. 2d 1, certiorari denied, October 14, 1946 — 5

Commissioner v. *Bayne's Estate*, 155 F. 2d 475 — 6

Estate of Spiegel v. *Commissioner*, No. 1144, this Term — 5

Statute:

Internal Revenue Code, Sec. 811 (26 U. S. C. 1940 ed., Sec. 811) — 7

Miscellaneous:

Treasury Regulations 105, Sec. 81.17 — 7

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 11–12) is unreported. The prevailing and dissenting opinions in the Circuit Court of Appeals (R. 30–35) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1947 (R. 35). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transfer in trust was intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 811 (c) of the Internal Revenue Code where the transfer was made in 1924 and the decedent retained the income for life plus a possibility of reversion by operation of law; and whether in the circumstances, the Circuit Court of Appeals had power to reverse the Tax Court's decision that the transfer was not taxable.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set out in the Appendix, *infra*, pp. 7–9.

STATEMENT

The Tax Court found the following facts (R. 9–11):

The taxpayer is the Estate of Francois L. Church, who was at the time of his death, December 11, 1939, a resident of the State of New Jersey. The estate tax return was filed with the Collector of Internal Revenue for the Fifth District of New Jersey on March 10, 1941. (R. 9.)

By deed of trust, dated May 17, 1924, decedent transferred to himself, E. Dwight Church, and

Charles T. Church, 1,000 shares of stock of Church & Dwight Company, in trust for the purposes and upon the terms hereinafter described. The instrument was executed and delivered in the State of New York, in which State decedent continuously resided until his removal to New Jersey in 1937. E. Dwight Church and Charles T. Church, brothers of the half-blood of decedent, have at all times here material continually resided in the State of New York. The shares constituting the corpus of the trust and the bank account of the trust have been physically located in New York. (R. 9.)

At the time of the creation of the trust, decedent had but recently attained his twenty-first birthday, whereupon there was delivered to him property of substantial value which had theretofore been held and managed for him by his mother. The principal asset of the estate consisted of 1,000 shares of the stock of Church & Dwight Company, a corporation closely held by the Church and Dwight families. In March 1924, it came to the attention of E. Dwight Church that decedent was leading a rather riotous existence, drinking heavily, squandering his money, and associating with companions of questionable repute. Fearful that decedent, as a result of his improvidence, might dispose of the 1,000 shares of Church & Dwight stock to persons outside of the family circle, E. Dwight Church suggested to

decedent that he place the stock in trust in order to safeguard it and to assure decedent an income for his life. Following this suggestion, decedent established the trust above mentioned. The trust indenture provided that the income should be paid to decedent for life and upon his death the trust should terminate and the corpus be distributed to his issue then surviving. (R. 9–10.) The trust instrument further provided as follows (R. 10):

> *In the event* that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living.

No power to alter, amend, or revoke was reserved by the grantor. (R. 10.)

On May 17, 1924, the date of the creation of the trust, decedent had one brother and sister of the full blood and four half brothers. On that date, there were living seven children of the brothers of the half blood. Decedent was then unmarried and had no children. At death he was survived by his brother of the whole blood, who had two

children then living; his sister of the whole blood, who had one child then living; and his four half brothers, who had seven children then living. (R. 10–11.)

The Commissioner determined that the corpus of the trust was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death (R. 11). The Tax Court overruled that determination (R. 11–12). The Circuit Court of Appeals, sitting *en banc*, affirmed, one judge dissenting (R. 30–35).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In affirming the decision of the Tax Court.

(2) In not holding that the value of the trust property should be included in the grantor's gross estate under Section 811 (c) of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

On April 28, 1947, this Court granted a writ of certiorari in *Estate of Sidney Spiegel* v. *Commissioner*, No. 1144, this Term. Both the petitioner and the respondent there agreed that the decision of the Circuit Court of Appeals for the Seventh Circuit in that case was in direct conflict with that of the court below in the instant case, both on the question of taxability and of reviewability. It was pointed out in the memorandum for the

respondent in the *Spiegel* case (p. 6) that the conflict was even more widespread, the Circuit Courts of Appeals for the Second, Fifth, Sixth, and Ninth Circuits having decided the question of taxability here involved in the same manner as did the Circuit Court of Appeals for the Seventh Circuit in the *Spiegel* case. In addition to the decision in the *Spiegel* case, the decisions in two of the other cases mentioned as conflicting with that in the instant case on the question of taxability (*Commissioner* v. *Bank of California*, 155 F. 2d 1 (C. C. A. 9th); certiorari denied, October 14, 1946; *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (C. C. A. 2d)) were reversals of the Tax Court and are therefore in conflict with the instant one both as to taxability and reviewability.

CONCLUSION

The decision of the court below was incorrect. Moreover, the reasons which prompted this Court to grant certiorari in the *Spiegel* case require that a writ of certiorari be issued here as well. We suggest that the cases be set down for argument together.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY, 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's

worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916:

* * * * * *

Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to an-

other, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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No. 96 5

In the Supreme Court of the United States

OCTOBER TERM, 1947

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED,
EDWARD E. BLACK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 9–10) is unreported. The prevailing and dissenting opinions in the Circuit Court of Appeals (R. 17–22) are reported in 161 F. 2d 11.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1947. (R. 23.) The petition for a writ of certiorari was filed on May 20, 1947, and was granted on June 16, 1947. (R. 24.) The jurisdiction of this Court rests on

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transfer in trust was intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 811 (c) of the Internal Revenue Code where the transfer was made in 1924 and the decedent retained the income for life plus a possibility of reversion by operation of law; and whether in the circumstances, the Circuit Court of Appeals had power to reverse the Tax Court's decision that the transfer was not taxable.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*, pp. 8–10.

STATEMENT

The Tax Court found the following facts (R. 7–9):

The taxpayer is the Estate of Francois L. Church, who was at the time of his death, December 11, 1939, a resident of the State of New Jersey. The estate tax return was filed with the Collector of Internal Revenue for the Fifth District of New Jersey on March 10, 1941. (R. 7.)

By deed of trust, dated May 17, 1924, decedent transferred to himself, E. Dwight Church, and Charles T. Church, 1,000 shares of stock of Church & Dwight Company, in trust for the purposes and upon the terms hereinafter described.

The instrument was executed and delivered in the State of New York, in which State decedent continuously resided until he moved to New Jersey in 1937. E. Dwight Church and Charles T. Church, brothers of the half-blood of decedent, have at all times here material continually resided in the State of New York. The shares constituting the corpus of the trust and the bank account of the trust have been physically located in New York. (R. 8.)

At the time of the creation of the trust, decedent had but recently attained his twenty-first birthday, whereupon there was delivered to him property of substantial value which had theretofore been held and managed for him by his mother. The principal asset of the estate consisted of 1,000 shares of the stock of Church & Dwight Company, a corporation closely held by the Church and Dwight families. In March 1924, it came to the attention of E. Dwight Church that decedent was leading a rather riotous existence, drinking heavily, squandering his money, and associating with companions of questionable repute. Fearful that decedent, as a result of his improvidence, might dispose of the 1,000 shares of Church & Dwight stock to persons outside of the family circle, E. Dwight Church suggested to decedent that he place the stock in trust in order to safeguard it and to assure decedent an income for his life. Following this suggestion, decedent estab-

lished the trust above mentioned. The trust indenture provided that the income should be paid to decedent for life and upon his death the trust should terminate and the corpus be distributed to his issue then surviving. (R. 8). The trust instrument further provided as follows (R. 8):

> *In the event* that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living.

No power to alter, amend, or revoke was reserved by the grantor. (R. 8.)

On May 17, 1924, the date of the creation of the trust, decedent had one brother and sister of the full blood and four half brothers. On that date there were living seven children of the brothers of the half blood. Decedent was then unmarried and had no children. At death he was survived by his brother of the whole blood, who had two children then living; his sister of the whole blood, who had one child then living; and his four half brothers, who had seven children then living. (R. 8–9.)

The Commissioner determined that the corpus of the trust was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death. (R. 9.) The Tax Court overruled that determination. (R. 9–10.) The Circuit Court of Appeals, sitting *en banc*, affirmed, one judge dissenting. (R. 17–22.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In affirming the decision of the Tax Court.

(2) In not holding that the value of the trust property should be included in the grantor's gross estate under Section 811 (c) of the Internal Revenue Code.

ARGUMENT

This case is to be argued immediately following *Estate of Spiegel* v. *Commissioner*, No. 52, this Term. Although there are some differences in the facts, the basic questions presented here are essentially the same as the ones in the *Spiegel* case, and the decisions are in conflict as to both the taxability of the transfers and the power of the appellate courts to reverse the Tax Court.

In the instant case, the trust is construable in accordance with the law of New York, while in the *Spiegel* case the trust is construable in accordance with the law of Illinois. And in the instant case, the grantor retained the income for life, while in the *Spiegel* case, he gave it to his chil-

dren. But these points of difference do not affect the basic similarity of the two cases. In each of them, the provisions for the eventual distribution of the corpus were made dependent upon the grantor's death and nobody could obtain full dominion over the property until after he died. And here, as in the *Spiegel* case, the grantor gave the remainder to a restricted and exhaustible group of blood relatives, *if they survived him*, and made no provision for distribution of the corpus if they all predeceased him. Hence, if they had all died before him, the corpus would have reverted to him by operation of law. Restatement, Trusts (1935), Sec. 411; *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (C. C. A. 2d); *Newton* v. *Hunt*, 134 App. Div. 325, 334, affirmed, 201 N. Y. 599; *Doctor* v. *Hughes*, 225 N. Y. 305, 309.[1] Indeed, the Tax Court in the instant case recognized that there was such a possibility. (R. 9.) Reference is here made to our brief in the *Spiegel* case which sets forth the arguments in support of our contention that transfers of this

[1] In *Central Hanover Bank & Trust Co.* v. *United States*, 58 F. Supp. 565, the Court of Claims in holding the transfer there involved without the statute expressed doubt that under New York law there would be a possibility of reversion. The court based that doubt upon decisions such as *Matter of McCombs*, 261 App. Div. 449, affirmed, 287 N. Y. 557, which do not involve *inter vivos* trusts but testamentary dispositions. Those cases are inapplicable to *inter vivos* trusts for the same reasons as given in our *Spiegel* brief with reference to the Illinois law.

character are taxable under the law and the regulations.

Our brief in the *Spiegel* case also contains our views with respect to the power of the appellate courts to reverse the decision of the Tax Court in a case like this, and for the reasons therein given, we submit that the Seventh Circuit correctly reversed the Tax Court in the *Spiegel* case and the Third Circuit wrongly upheld it in the instant one.

CONCLUSION

The decision of the Circuit Court of Appeals was incorrect and it should therefore be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ARNOLD RAUM,
LEE A. JACKSON,
L. W. POST,
Special Assistants to the Attorney General.

OCTOBER 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his

death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another,

with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1395

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 11-12) is not officially reported. The opinions in the Circuit Court of Appeals (R. 30-35) are reported at 161 F. (2d) 11.

GROUNDS OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code. Respondent concedes the jurisdiction of this Court.

STATEMENT OF THE CASE

Respondent is the estate of Francois L. Church who died on December 11, 1939 a resident of the State of New Jersey (R. 9). The estate tax return was filed with the Collector of Internal Revenue for the Fifth District of New Jersey on March 10, 1941 (R. 9). The question before the lower courts was whether the corpus of an inter vivos trust established by decedent in 1924 should be included in his gross estate in computing the federal estate tax (R. 8-30).

By deed of trust dated May 17, 1924, decedent transferred to himself, E. Dwight Church and Charles T. Church, as trustees, 1,000 shares of stock of Church & Dwight Company on the terms hereinafter described (R. 9). The trust instrument was executed and delivered in New York (R. 9). Decedent continuously resided in New York until his removal to New Jersey in 1937 (R. 9). The other two trustees, decedent's brothers of the half blood, have at all times resided in New York (R. 9). The shares constituting the corpus of the trust and the bank account of the trust have always been located in New York (R. 9).

A few months before he created the trust decedent had attained the age of twenty-one and had received his property which had theretofore been held and managed for him by his mother (R. 9, 26). The decedent's principal asset was the 1,000 shares of stock, which were in a corporation closely held by the Church and Dwight families (R. 9-10).

In March, 1924 it had come to the attention of E. Dwight Church, an older brother of the half blood, that decedent was leading a riotous existence, drinking heavily, squandering his money and associating with companions of questionable repute (R. 10). He had a discussion with

decedent. He expressed to decedent a fear that decendent would dissipate the stock which was his principal asset (R. 10). He suggested to decedent that he place his stock in trust in order to prevent it from being dissipated and to assure decedent a life income (R. 10). Decedent thereupon offered to give the stock outright to E. Dwight Church (R. 18), but E. Dwight Church refused the offer and sent decedent to the family attorney to place the stock in trust (R. 10, 18). The purpose, as found by the Tax Court, was to insure decedent an income for his life (R. 10).

The trust indenture here under review resulted. It provided that the income should be paid to decedent for life and that upon his death the trust should terminate and the corpus be distributed to his issue then surviving (R. 10). The indenture provided that in default of issue the corpus should be distributed in equal shares to the brothers and sisters of the decedent then surviving, with any child or children of a deceased brother or sister to take the share which their parent would have been entitled to receive if living (R. 10). No power to alter, amend or revoke was reserved (R. 10).

At the time the trust was created decedent was unmarried and had no issue (R. 10). He had one brother and one sister of the full blood and four brothers of the half blood (R. 10). There were also seven children of the brothers of the half blood then alive (R. 10). Of these thirteen people, seven were younger than decedent (R. 26-27).

Decedent died at the age of thirty-seven without issue (R. 17, 26). There survived him sixteen persons who were brothers and sisters of the half and full blood or the children of such brothers and sisters (R. 10-11; 26-27). Of these

sixteen people, ten were younger than decedent (R. 26-27). At the time of decedent's death the corpus of the trust was worth $188,800 (see original record filed pursuant to stipulation at R. 36-37).

If there existed any possibility of reverter to decedent or his estate by operation of law on the date of decedent's death the actuarial value of such possibility was less than three ten-thousandths of one cent (R. 24). This value is computed on three assumptions favorable to petitioner but not necessarily correct,—namely, that decedent would have lived a normal span of life, that he would have had no issue and that his brothers and sisters would have had no additional children (R. 23-24).

The petitioner included the value of the trust in decedent's gross estate on the ground that the trust was "a transfer intended to take effect in possession or enjoyment at or after decedent's death" (R. 11).

The Tax Court held that the gift in trust was not made in contemplation of death (R. 11), that "the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could" (R. 12), and that the gift was not one intended to take effect in possession or enjoyment at or after death (R. 12).

Petitioner's appeal to the Circuit Court of Appeals was argued twice,—once before three of the judges and again on the court's own motion, before the full court (R. 28). The Circuit Court of Appeals has affirmed on the grounds that it could not identify a clear-cut mistake of law in the Tax Court decision and that it was not its task to draw inferences from facts or to supplement stipulated facts (R. 31). The Circuit Court of Appeals gave no indication as to what result it would have reached if its powers to review

were broader than it understood them to be. One judge dissented on the grounds that in his opinion a reversionary interest in favor of decedent did exist by operation of law and that under the decisions of this Court in *Fidelity Co.* v. *Rathensies*, 324 U. S. 108, *Commissioner* v. *Estate of Field*, 324 U. S. 113 and *Goldstone* v. *United States*, 325 U. S. 687, petitioner was entitled to judgment (R. 32-35).

SUMMARY OF ARGUMENT

Respondent opposes petitioner's application on the following grounds:

1. The decision of the Circuit Court of Appeals is not in conflict with the decision of another circuit court of appeals on the same matter.

2. The Circuit Court of Appeals has not decided an important question of federal law which should be settled by this Court.

3. The Circuit Court of Appeals has decided no federal question in a way probably in conflict with applicable decisions of this Court.

4. The Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable local decisions.

ARGUMENT

Point 1

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

The converse of this proposition is the only ground which petitioner advances in support of his application (pp. 5-6 of the Petition). He contends that the decision below is in conflict with *Estate of Sidney Spiegel* v. *Commissioner*, 159 F. (2d) 257 (C. C. A. 7th, 1946); *Commissioner* v. *Bank of California*, 155 F. (2d) 1 (C. C. A. 9th, 1946); and *Commissioner* v. *Bayne's Estate*, 155 F. (2d) 475 (C. C. A. 2d, 1946). Petitioner says that those cases are "in conflict with the instant case both as to taxability and reviewability" (Pet., p. 6).

In so far as taxability is concerned, petitioner is clearly mistaken. The Circuit Court of Appeals has not attempted to decide that question in the instant case. It has affirmed because it believes that under the decisions of this Court it lacks the power to review the Tax Court's decision (R. 31).

And on the issue of reviewability there is no conflict between the circuits because the underlying circumstances in the cases petitioner cites were so substantially different from those in the instant case that a different conclusion as to reviewability was justified.

In the only other case involving a New York trust (*Bayne's Estate*) there does not appear to have been any dispute as to whether the corpus would revert to the settlor if he survived all designated takers. Here there is. The Tax

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Court concluded in the instant case that the decedent had disposed of his interest in the property as well as any man could (R. 12). There is no certainty that the Tax Court erred in this respect. See *Central Hanover Bank & Trust Company* v. *United States*, 58 F. Supp. 565 (Ct. Cls., 1945).

In none of the other cases was there affirmative and positive evidence that the decedent intended to give away his entire interest in the corpus. Here he cared so little about the stock that he offered to give it outright to his brother but was persuaded to retain a life estate (R. 18). If the statutory word "intended" means anything, it is clear that decedent never intended to keep any interest in the corpus. Moreover the Tax Court has found that decedent's purpose in placing the stock in trust was "to assure decedent an income for his life" (R. 10).

In none of the other cases was the disposition so complete in fact. The possibility of reverter in the instant case, if any there was, was worth less than three ten-thousandths of one cent (R. 24). That means it was worthless. To all intents and purposes it did not exist.

There is so much difference in the evidence before the Tax Court in the instant case from the evidence in the cases decided in the other three circuits that there cannot be said to be any real conflict in the respective results on the question of reviewability.

Point 2

THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The court immediately below did not attempt to decide whether a remote reverter by operation of law existed or

whether, if it existed, the corpus of the trust should be included in the decedent's gross estate. It affirmed the Tax Court because it was unable to identify any clear-cut mistake of law. (R. 31).

It certainly understood correctly its powers of review of the Tax Court as laid down in a series of decisions by this Court. *Wilmington Trust Company* v. *Helvering*, 316 U. S. 164; *Dobson* v. *Commissioner*, 320 U. S. 489; *Equitable Life Assurance Society* v. *Commissioner*, 321 U. S. 560; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Choate* v. *Commissioner*, 324 U. S. 1; *Trust of Bingham* v. *Commissioner*, 325 U. S. 365; *Kelley Co.* v. *Commissioner*, 326 U. S. 521.

And it applied the rules correctly. The Tax Court found as a fact that decedent placed the stock in trust to insure him a life income, as a mixed question of law and fact that he disposed of his interest in the corpus as well as any man could, and as a question of law that the mere possibility of reverter by operation of law, if any existed, was not sufficient to bring the facts within the doctrine of *Helvering* v. *Hallock*, 309 U. S. 106. The first finding was amply supported by the evidence. The second, in so far as based on fact, was amply supported by the evidence and, in so far as based on law, was not clearly contrary to the law of New York. That being so, it was neither necessary nor proper for the Circuit Court of Appeals to consider the third.

Point 3

THE CIRCUIT COURT OF APPEALS HAS DECIDED NO FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Circuit Court of Appeals has followed the decisions of this Court in limiting its power of review. Further than that it has not attempted to go.

Point 4

THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPICABLE LOCAL DECISIONS.

The Circuit Court of Appeals has not purported to decide, and has not decided, any question of local law.

CONCLUSION

The petition should be denied.

Respectfully submitted,

WILLIAM W. OWENS,
Attorney for Respondent.

New York, N. Y.
June 9, 1947.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 96

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 96

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 7-10) is not officially reported. The opinion of the Circuit Court of Appeals and the dissenting opinion of one judge (R. 17-22) are reported at 161 F. 2d 11.

JURISDICTION

Petitioner invoked the jurisdiction of this Court under section 240(a) of the Judicial Code. The case is here by writ of certiorari granted by this Court on June 16, 1947.

STATEMENT

The statement contained in petitioner's brief is accurate. The following, however, are additional facts not therein set forth:

When, in March, 1924 E. Dwight Church, an older half brother, had the conference with decedent in which he suggested that decedent place the stock in trust in order to safeguard it, the decedent thereupon offered to give the stock to E. Dwight Church (R. 4). E. Dwight Church refused and sent him to the family attorney to have the stock placed in trust (R. 4). When decedent went to the family attorney to have the trust instrument drawn, he told the attorney that his purpose was to avoid any chance that he might dissipate the stock (p. 33, typewritten transcript of record).*

Decedent died at the age of 37 without issue (R. 3, 7, 8). There survived him sixteen persons who were brothers and sisters of the half blood and full blood or the children of such brothers and sisters (R. 3, 14). Of these sixteen people, ten were younger than decedent (R. 14). At the time of decedent's death the corpus of the trust was worth $188,800 (see p. 2 of statement attached to ninety-day letter in typewritten transcript). If there existed any possibility of reversion to decedent or his estate by operation of law on the date of decedent's death the actuarial value of such possibility was less than three ten-thousandths of one cent ($.000003-) (R. 12-13).

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*Stipulation filed with this Court provides that either party may refer in brief to any portion of the transcript of record which is not included in the printed record.

The Tax Court held that the gift in trust was not made in contemplation of death (R. 9), that "the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could" (R. 9-10), and that the gift was not one intended to take effect in possession or enjoyment at or after death (R. 10).

STATUTE INVOLVED

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(26 U. S. C. (1940 ed.) Sec. 811.)

SUMMARY OF ARGUMENT

1. There was no possibility that the settlor or his estate would come into possession or enjoyment of the corpus of the trust. Construction of the trust is governed by the laws of New York. The trust does not contain any express condition that the children of brothers and sisters of the settlor must survive the settlor in order to become entitled to the corpus if all the other conditions are fulfilled. Under the New York decisions, involving both testamentary and *inter vivos* trusts, a condition of survivorship will not be implied even though prior gifts in the same instrument contain express conditions of survivorship. Moreover, if there be any ambiguity in the instrument it may, under the law of New York, be resolved by resort to extrinsic circumstances. The fact that the motive in placing the stock in trust was to prevent the decedent from ever being able to dispose of it to persons outside the family circle dictates a construction which would prevent any possibility of reversion.

2. Granting, but for the sake of argument only, that there is a possibility of reversion, it is so infinitesimal that it should be ignored. Taxation is a practical thing. A reversion that is worth less than three ten-thousandths of one cent is no reversion at all. For practical purposes it does not exist. Every word of a statute should be accorded a meaning if possible. If the word "intended", as used in the statute, is to be accorded any meaning, it must mean that where the impliedly reserved interest is so remote that an ordinary man would not consider that it existed there is no intent to postpone the complete disposition of the corpus.

3. Under the rule of *Dobson* v. *Commissioner*, the decision of the Tax Court should be affirmed. Its findings of fact are supported by substantial evidence and are not contested by petitioner. The conclusion of law—that the decedent disposed of his interest in the corpus as well as any man could—is a correct interpretation of New York law, as demonstrated in Point 1. Even if there were a remote possibility of reversion, it is a correct interpretation of section 811(c) of the Internal Revenue Code, as demonstrated in Point 2. Petitioner has failed to show that the Tax Court has made a clear-cut mistake of law.

ARGUMENT

POINT 1

THERE WAS NO POSSIBILITY THAT THE DECEDENT OR HIS ESTATE WOULD COME INTO POSSESSION OR ENJOYMENT OF THE CORPUS OF THE TRUST.

As conceded by petitioner (Brief, p. 5), construction of the indenture is governed by the laws of New York. The settlor was a resident of New York when he created the trust (R. 8); all three trustees were residents of New York (R. 8); the trust corpus consisted of stock certificates which were physically located in New York (R. 8); the indenture was drawn in New York by a New York lawyer (see pp. 32-33, typewritten transcript of record); the indenture was executed, and the stock was delivered, to the trustees in New York (R. 8); and the instrument contains not the slightest suggestion that the settlor intended it to be construed under the laws of any other jurisdiction (R. 4-6).

In the ensuing examination of the New York authorities, it is necessary to bear in mind two undisputed facts, either of which, as will be demonstrated, is in itself sufficient to sustain respondent's contention. First, that although the deed of trust expressly makes survival of the settlor one of the conditions precedent to the enjoyment of the corpus by the brothers and sisters of the settlor, it does not expressly make a like survival by the children of a deceased brother or sister a condition precedent to the enjoyment of the corpus by such children (R. 5); and second, that the purpose of establishing the trust as found, on undisputed evidence (R. 3; see also p. 33, typewritten transcript) by the Tax Court, (R. 8) was the fear "that decedent, as a result of his improvidence, might dispose of the 1,000 shares of Church & Dwight stock to persons outside the family circle".

(a) The instrument itself permits no possibility of a reversion.

The pertinent clause of the indenture reads as follows (R. 5):

> "In the event that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living."

Mr. Church expressly gave the corpus to his surviving issue. In default of surviving issue, he expressly gave it

to his surviving brothers and sisters. He next gave it to "any child or children of a deceased brother or sister." Since children of brothers and sisters were *in esse*, it is clear that unless the gift to such children was conditioned upon their survivorship of Mr. Church there could be no reversion, for the dispositions would then be complete. Consequently, petitioner is asking this Court to imply a condition of survivorship in the gifts to the children which would be identical to the expressed condition of survivorship in the gifts to issue and to brothers and sisters. Such an implication is contrary to a well-established rule of construction in the State of New York. In *Fulton Trust Co. v. Phillips*, 218 N. Y. 573 (1916), the court said (p. 581):

> "The absence of a gift over in the alternative and of any words of survivorship in this connection has a special significance arising from the fact that in other provisions of the will where the testatrix desired to provide for survivorship she used apt words expressive of such a purpose."

No such implication of survivorship was permissible under the English common law.* It is certainly not per-

*2 Jarman on Wills (6th Ed., 1893) 199-200 says:

"* * * it is now settled that children are not by implication required to survive the period of distribution as expressed with regard to their parents in whose place they stand, whether the gift to the issue be original—as where it is to such of a class of legatees as survive the period of distribution, and the issue of such as are then dead—or strictly substitutional, *i.e.* divesting a previous vested gift to the parent. And though the child dies before its parent, it will still be entitled, if the gift to it be original; but not, it seems, if the gift be substitutional."

Church's gift over to the children of his brothers and sisters was original under Jarman's definition since the brothers and

missible in New York since the Revised Statutes of 1830 which made the rules as to future estates apply to wills and deeds alike and notably expanded the scope of the common law rule in favor of the early vesting of future estates. *Moore* v. *Littel*, 41 N. Y. 66, 78 (1869); Gray, *The Rule Against Perpetuities* (4th Ed. 1942) 92-94; Fowler, *The Real Property Law of the State of New York* (3rd Ed. 1909) 51-53.* The common law distinction between vested and contingent remainders was substantially altered in favor of a vested interpretation (now § 40, New York Real Property Law); and future estates, whether vested or contingent, became descendible, devisable and alienable in the same manner as estates in possession (now § 59, New York Real Property Law).** These statutes not only strengthened and sustained the policy of the law which had long favored the holding of estates vested rather than contingent (*cf. Moore* v. *Littel, supra*, p. 79) but they also created an unwillingness of the courts of New York to hold an estate subject to divestment by implying a condition which was not expressed. As a result, the decisions in New York since the revision of 1830 hold that dispositions analogous to the one here

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sisters had to survive the period of distribution. Hence these children or their legal representatives would take the remainder under the final alternative even if they predeceased their parent. An early New York case on this exact point so held. *Wright* v. *Dugan*, 34 Hun 634, 15 Abb. N. C. 107 (1885).

*By Section 11 of the New York Personal Property Law (see appendix) "limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property". Even in cases not covered by statute the courts generally assimilate the two. *National Park Bank* v. *Billings*, 144 App. Div. 536, 541, aff'd 203 N. Y. 556 (1911); *Stringer* v. *Young*, 191 N. Y. 157, 162 (1908).

**See appendix.

under consideration are not to be construed so as to imply survivorship conditions. *Hennessy v. Patterson*, 85 N. Y. 91 (1881) (testamentary disposition); *Wright v. Dugan*, 34 Hun 634 (case No. 12), 15 Abb. N. C. 107 (1885) (testamentary trust); *Matter of Bowers*, 195 App. Div. 548, aff'd 231 N. Y. 613 (1921) (*inter vivos* trust); *Matter of Schaefer*, 160 Misc. 43 (Surr. Ct., N. Y. Co., 1936) (testamentary trust); *Matter of Stephani*, 161 Misc. 803, aff'd 253 App. Div. 705 (1937) (testamentary trust); *Matter of McCombs*, 261 App. Div. 449, aff'd 287 N. Y. 557 (1941) (testamentary trust); *Matter of Elting*, 268 App. Div. 74, aff'd 294 N. Y. 941 (1945) (testamentary trust).

In *Matter of Elting*, 268 App. Div. 74, *supra*, the testatrix established a trust for her husband for life, then for her son, Clarence, for life, with remainder to the children of Clarence surviving him, and in default of such surviving children "to the children of my nephew Abraham * * * and the children of my niece, Mary * * * share and share alike". Clarence died without issue. Abraham's children predeceased Clarence but the children of Mary survived Clarence. The question was whether the children of Abraham took half the remainder or whether survivorship was an implied condition precedent so that the entire corpus would go to the children of Mary. The court refused to imply a condition of survivorship and held that the children of Abraham had taken remainders "subject only to being divested by the death of the son [Clarence] of the testatrix with issue him surviving and to modification by being opened to let in to share after-born children of said niece or said nephew".

The similarity of the dispositions in the *Elting* case to the one here under consideration is obvious. The primary

remainders in both instances are expressly conditioned on survivorship of the life tenant. The secondary remainder in the *Elting* case and the tertiary in the instant case were not expressly conditioned upon survivorship.

In *Matter of McCombs*, 261 App. Div. 449, *supra*, the testator left real and personal property in trust to his widow Phoebe for life, remainder to his sons Wilton and Harry, but provided (p. 451):

> "Should either of my said sons die before my said wife, leaving no issue him surviving, then and in that case I give, devise and bequeath said deceased son's share in my property hereby devised or bequeathed to the survivor".

When the testator died he was survived only by his widow and son Harry. Wilton had left no issue. Harry died before the life estate terminated and the question was whether his failure to survive the life tenant deprived him of his interest in the remainder. The court held that the condition of survivorship applied only to whichever of the sons died first and refused to imply a condition of survivorship to Harry's remainder, saying (p. 451):

> "The effect of the ninth paragraph is not to convert these vested remainders into contingent remainders, but to render them subject to divestment as to one son in the event that he failed to survive the other during the lifetime of their mother, leaving no issue. At the same time it served to give to each son an alternate vested remainder in such of the specific realty as to which the other was the primary remainderman, subject to divestment in the event that such other son survived their mother or the alternate remainderman during the lifetime of their mother, or died leaving issue."

It is particularly significant that the result was reached in the face of the fact that an intestacy would have resulted in giving the corpus to a blood descendant of the testator,—namely, the daughter of his deceased daughter.

Hennessy v. *Patterson*, 85 N. Y. 91, *supra*, is a leading case in New York on the subject. The will was crudely drawn but the testator gave his widow a life estate in real property, with remainder to any "children" of his daughter Margaret "living after her death", but if Margaret died "without leaving any issue" then to his nephew John Foley. The testator died in 1872, his widow in 1874, Foley in 1876 and daughter Margaret without issue in 1878. The question was whether the gift to Foley was conditioned upon his survival of Margaret, for if it was so conditioned the remainder, being not otherwise disposed of, would revert to the testator's estate. The Court of Appeals refused to imply to Foley's remainder the condition of survivorship that was expressly attached to the remainder to Margaret's children, and held that Foley's estate took the corpus.

The similarity of the dispositions in *Hennessy* v. *Patterson* to those in the instant situation is striking. In both instruments the donor's own issue took only in the event of survivorship. In both instruments there were gifts to nephews not expressly conditioned on survivorship.

In *Wright* v. *Dugan*, 15 Abb. N. C. 107*, *supra*, the testator left personal property in trust for his widow, Mary, for life with remainders, in equal shares, to his sisters, Eleanor and Jane. He further provided (p. 116):

> ". . . .in case either or both my said sisters shall have died before the decease of my said wife, then

*The facts are not fully reported in the official report, 34 Hun 634.

> and in such case the child or children of the one so dying to take and be entitled to the share and portion his, her or their mother would have been entitled to had such mother survived my said wife."

Jane survived the life tenant so there was no question as to her being entitled to one-half the corpus. Eleanor predeceased the life tenant. Eleanor had had five children. One of the five had predeceased both Eleanor and the life tenant, another had survived Eleanor but predeceased the life tenant and the other three had survived both Eleanor and the life tenant. The question was whether the court would imply the same condition of survivorship to the children of Eleanor as was expressed in the gift to Eleanor because, if so implied, the estates of the two children who predeceased the life tenant would take nothing. The court refused to imply the condition and held that the estates of the two children of Eleanor who failed to survive the life tenant took shares of the corpus. The court said (p. 117):

> "We think the intention of the testator that the estate should so vest and take the direction thus indicated was manifest by the provisions of the will, and the construction given by the learned referee is upheld by authority. His construction, to use the language of Andrews, J. in Stevens v. Leslie (70 N. Y. 215), 'prevents the disinheritance of the issue of remainder-men who may happen to die before the termination of the precedent estate, *a consequence which cannot be supposed, in the absence of express words, to have been intended by the testator.*' (Italics supplied)

The case is particularly strong evidence of the unwillingness of the New York courts to imply survivorship conditions.

for one of the children had not only failed to survive the life tenant but had also failed to survive his mother whose estate was expressly conditioned upon survivorship.

A comparatively recent case is *Matter of Schaefer*, 160 Misc. 43, *supra*, where the testator left property in trust for his son Albert for life, remainder to the surviving "children" of Albert; but, if Albert "shall die leaving no lawful issue him surviving", to the testator's four daughters and sons, Amelia, Rose, Edward and George "and the issue of such of them as shall have died * * *, the issue of any deceased child taking by representation the share only which its parent, if living, would have taken". All five children survived the testator but only Rose survived Albert. Amelia and George left issue who survived Albert but Edward left no issue. The question was whether Edward's estate was entitled to a share of the corpus, the argument to the contrary being that inasmuch as survivorship had expressly been made a condition precedent to the enjoyment of the corpus by Albert's issue, it should be implied as a condition precedent to the enjoyment of the corpus by his brothers and sisters or the issue of deceased brothers and sisters. Surrogate Foley held to the contrary, saying (p. 47):

> "The only contingency upon which the alternative gift of the remainder to the named individuals is limited, is the death of Albert without issue. Survivorship to the termination of the trust was not a contingency upon which the gift of the remainder to Edward was limited. The substitutional gift to the issue of the named remaindermen only operates as a divestiture clause as to a remainderman who dies leaving issue. (*Matter of Watson*, 262 N. Y. 284; *Stringer v. Young*, 191 id. 157;

> *Bowditch v. Ayrault*, 138 id. 222; *Staples v. Mead*, 152 App. Div. 745; *Matter of Hunigerford*, 158 Misc. 317; *Matter of Jarvis*, 152 id. 252; *Matter of Leonard*, 143 id. 172.) As Albert never had issue and Edward died without issue, his interest in the remainder was never divested and one-fourth of the principal of the trust is now payable to his estate."

The vitality of the rule against the implication of survivorship conditions is particularly apparent in the decision of Surrogate Foley in *Matter of Schaefer* inasmuch as, if he had found that such a condition was implied, the entire corpus would have gone to the testator's issue *per stirpes*, a result which most testators would presumably desire.

In *Matter of Stephani*, 161 Misc. 803, *supra*, the testatrix left property in trust for her son, Alphonse, for life with remainder on his death to her sister, Marie, "or in case she be then dead to her children share and share alike". Marie predeceased Alphonse without issue. The question was whether the court would imply a condition of survivorship in the gift to Marie, thus preventing her estate from taking the corpus. Surrogate Foley refused to imply such a condition (p. 806):

> "I hold further under the language of the will that the testatrix intended the remainder to vest in Marie Hill, subject to be divested upon her death before the life beneficiary only if she left children her surviving."

The cases which have been analyzed up to this point involve testamentary dispositions. From the footnote on page 6 of his brief in this case and the discussion on page

12 of his brief in the *Spiegel* case,* it would appear that petitioner does not seriously dispute the fact that, if Mr. Church had used the same language in establishing a testamentary trust, a condition of survivorship would not be implied in the gifts to the children of brothers and sisters. Petitioner says the difference in treatment is "apparently based upon the rule that a testator is presumed not to have intended to die intestate as to any portion of his property." (*Spiegel* brief, p. 12).

It is true that New York courts endeavor to avoid testamentary constructions that will result in an intestacy, but petitioner cites no New York case which even intimates that the rule against implying conditions of survivorship arises out of that principle. Moreover, petitioner's explanation is obviously inapplicable to many of the testamentary cases hereinabove analyzed.

In *Matter of Elting, supra;* the issue was not whether there was an intestacy. It was whether, under the language of the will, the testator intended that only such children of his nephew and niece who survived his son Clarence were to take. The nephew's children had predeceased Clarence but the niece's had not. In *Matter of Schaefer, supra*, the question was whether, under the terms of the will, only the issue of the testator who survived the life tenant took the corpus or whether the estate of a child of the testator who predeceased the life tenant without issue was also entitled to share in the corpus. Here again there was no possibility of intestacy regardless of how the issue

*Petitioner advances little argument in his brief in this case, but evidently seeks to incorporate by reference his argument in his brief as respondent in the *Spiegel* case (See Petitioner's brief, pp. 6-7).

was decided, and the result was predicated solely on the refusal to imply a survivorship condition where none was expressed. And in *Wright* v. *Dugan*, *supra*, the court was not faced with an intestacy if its decision went the other way. The only question was whether one-half the corpus should be divided between only three of the nephews and nieces of the testator or whether the estates of two deceased nephews might also share. Petitioner's theory for distinguishing the testamentary cases could not possibly have been the *rationale* of those decisions.

One of the purposes of the New York Revised Statutes of 1830 was to abolish any distinctions between future estates based solely on whether they were created by deed or by will. The Notes of the Original Revisers of the Revised Statutes (Note to 1 R. S. 722, sec. 7) state that their object was "to abolish all technical rules and distinctions having no relation to the essential nature of property * * * and to reduce all expectant estates substantially to the same class, and apply to them the same rules whether created by deed or devise."*

Accordingly when the New York courts were presented with the question of implying a survivorship condition in connection with an *inter vivos* trust they refused to do so. *Matter of Bowers*, 195 App. Div. 548, aff'd 231 N. Y. 613 (1921), *supra*. That case resulted in the application of the same rule against implied survivorships as exists with respect to testamentary trusts. The settlor, by deed *inter*

*Appendix III, p. 1278 of Fowler's *The Real Property Law of the State of New York* (3d Ed., 1909). Fowler's comment, *op. cit.* at p. 52 was "The revisers intended to bring the rules relative to limitations of estates into harmony. * * * they made the new rules about future estates apply to both wills and grants alike. These were immense and comprehensive changes, and fertile of great results in modern law."

vivos, established a trust of personal property, giving a life estate and a general testamentary power of appointment over the corpus to his daughter Mary. In default of appointment the corpus was given to the settlor's children, Martha and William, in equal shares, "the issue of either *then deceased* taking its parent's share by representation, and if one be *then deceased* leaving no issue the survivor to take the whole, and if both be *then deceased*, only one leaving issue, such issue to take the whole" (italics supplied).

The contest was between the executors of the settlor's estate and the Comptroller of the State of New York. The state claimed that the words "then deceased", which clearly expressed survivorship, meant that if the life tenant died without issue neither Martha nor William nor their issue could take unless they survived the life tenant. The state therefore contended that there was a remote possibility of reverter, so that the entire corpus of the trust should be included in the settlor's estate for inheritance tax purposes under the then section 220 of the New York Tax Law which read:*

> "A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, * * *.
>
> * * * * * *
>
> "4. When the transfer is * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death."

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*8 Birdseye, Cumming & Gilbert, *Annotated Consolidated Laws of New York* (2d ed., 1918) 8515-8516.

Both courts held that there was no possibility of reversion and that the trust was therefore not includible in his gross estate. The appellate division said (p. 550):

> "There can be no question that by the terms of the foregoing provision John M. Bowers [the settlor] vested in the trustees the property thereby transferred with no right of reversion in himself."

The result could only have been reached on the theory that the survivorship conditions which were expressed in all other situations would not be implied in the one situation where both Martha and William predeceased the life tenant leaving no issue. A reading of the state's brief in the Court of Appeals makes it perfectly plain that such was the ultimate question before the court. It said in its brief in the Court of Appeals (pp. 5, 10):

> "The result of these sections is that if in Mr. Bowers' lifetime Martha Bowers and William G. Bowers had died leaving no issue, and Mary Coppell had died leaving no issue, and no will, that the trust terminated; the property reverted to the grantor and now passes by the residuary clause of his will.
>
> * * * * * *
>
> "If the deaths took place in the order suggested in the case at bar will not the property revert to Mr. Bowers' estate, and pass under the residuary clause of his will? If so it would seem improper to declare this transfer of the property in these trust deeds free from tax at this time."

and the executors' brief in the Court of Appeals took direct issue, saying (p. 12):

> "It therefore appears very clearly that as to each one of the four trusts, the donor made as absolute a disposition of the fund as it was possible to make."

In *Central Hanover Bank & Trust Company* v. *United States*, 58 F. Supp. 505 (Ct. Cls., 1945), the decedent had created an *inter vivos* trust of personal property, reserving a life estate for herself with remainders to her three children and the survivor or survivors of them, in equal shares, but if any of her three children should predecease her leaving issue him or her surviving, then such issue was to take the share which the parent would have received if living. (see 57 F. Supp. 497, 499). The question was whether survivorship of the settlor-life tenant was an implied condition precedent to the enjoyment of the corpus by the issue of a deceased child, for, if it was, there would clearly have been a reversion if all three children and their issue had predeceased the life tenant. The Court of Claims cited a number of the New York authorities on testamentary trusts and concluded:

> "There may be some doubt that these decisions are equally applicable to remainder interests created by trust, but they may be * * *".

It is submitted that the Court of Claims' recognition of the possibility is completely vindicated by the *Bowers* case, which apparently was not called to its attention. In any event, the Court of Claims gave judgment for the taxpayer.

Nor is *Pennsylvania Co.* v. *United States*, 62 F. Supp. 697 (1945) a repudiation of the Court of Claims' view in the earlier case, as petitioner intimates (*Spiegel* brief, p. 23). In that case the settlor provided an express reversion in one contingency, a general testamentary power of appointment in himself in another.

Petitioner, in his *Spiegel* brief, cites a number of Illinois cases which he claims are in support of his position. It is scarcely necessary to discuss them here for they are of no

value in construing a trust under the laws of New York. The only other authorities which he cites are (Brief, p. 6) Restatement of the Law of Trusts (1935), Sec. 411; *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (C. C. A. 2d, 1946); *Newton* v. *Hunt*, 134 App. Div. 325, 334 (1909), and *Doctor* v. *Hughes*, 225 N. Y. 305, 309 (1919). On analysis none of these authorities is even remotely in point.

Section 411 of the Restatement provides:

> "Where the owner of property gratuitously transfers it and properly manifests an intention that the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust should arise or the intended trust fails for illegality."

Section 411 scarcely advances the discussion, for it merely says that if there is not a complete disposition there is a resulting trust in favor of the transferor. The issue in the instant case is whether there is a complete disposition.

In *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 *supra*, the dispository language made survivorship an express condition precedent to the enjoyment of every gift of the corpus. The taxpayer, in the brief, admitted the existence of a remote possibility of reversion and the court therefore did not have to decide that question. The opinion does not set forth *verbatim* the language of the trust instrument but it can be found in the Tax Court report (4 T. C. M. 145, 146-147). Briefly, the settlor reserved a life estate, with the remainders to such of his issue as might survive him. In default of surviving issue he gave the corpus "in equal parts to the brothers and sister of the

Grantor *him surviving* and the issue *him surviving* of any brother or sister who shall have died before him, * * *." (Italics supplied.)

Doctor v. *Hughes*, 225 N. Y. 305, *supra*, was a case where the settlor placed real property in trust for himself for life with remainder to his "heirs at law". His two daughters were his prospective heirs at law. Judgment creditors of one of the daughters brought an action for an adjudication that they had an interest in the land on the ground that the daughters had remainders which were not subject to divestment. The court held that the words "heirs at law" of the settlor were words of limitation, not words of purchase, and that the settlor had therefore retained the reversion. It is difficult to see in what respect the case assists in the solution of the problem now before this Court, except possibly to demonstrate that a final limitation to the settlor's next of kin would not necessarily have resulted in a complete disposition of the corpus although petitioner, in his regulations promulgated May 1, 1946* (nine days before the second argument of this appeal in the Circuit Court of Appeals) appears to

*Reg. 105, §81.17, as amended May 1, 1946. Example (6) therein contained reads:

> "*Example (6).* The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate."

Other parts of the section are set forth at pp. 30-32 of petitioner's *Spiegel* brief.

think it would. The language on the page (309) to which petitioner refers merely says, as does section 411 of the Restatement, that if the settlor fails to give everything away there is a resulting trust, a reversion, of what is not given.

The only other New York authority cited by petitioner is *Newton* v. *Hunt*, 134 App. Div. 325, *supra*, which likewise is not in point. The facts were quite involved and, as the court pointed out (p. 328), it is necessary to refer to its earlier decision in *Newton* v. *Jay*, 107 App. Div. 457, to understand them. Eliminating the surplusage, the case was as follows:

The settlor in 1872 placed real and personal property in trust, reserving a life estate and a general power of appointment over the remainder. In 1879, she exercised the power by deed, giving a life estate to her husband, remainder to such of her children as should be living at his death, and to the issue of such of her children as should then have died. However, she expressly reserved a special testamentary power to give the corpus to one or more children or one or more of their issue to the exclusion of others, and a general testamentary power over the corpus if she had no living issue when her life estate and that of her husband terminated.

In 1898 the settlor had four children, three of whom were of age. Her husband had died. As security for a loan she and the three older children mortgaged their interest in the trust, and simultaneously she purported to release her powers of appointment "to the end and intent that the said trust estate shall vest absolutely subject to the life estate of the said Anna Bankard Hunt [the settlor] in her four children in equal shares."

The action was one by an assignee of the mortgagee to enforce payment of the debt out of the trust. The questions were whether the settlor's life estate and the remainders of the three older children could be applied to satisfaction of the debt. The court held that the life income could be so applied in view of the New York rule that one may not create a spendthrift trust for himself. It also held that the three children had effectively mortgaged such interests in the corpus as they might eventually enjoy, but said that the application of the corpus would have to await the death of the settlor because no child or his estate might ever enjoy the corpus since his issue would take a vested remainder if he predeceased his mother.

Petitioner seizes (Brief, p. 6) upon the following language of the opinion as supporting the proposition that there was a possibility of reverter in the instant case (134 App. Div. 334):

> "It appears by the trust indenture of November 18, 1879, that there is a possible interest in reversion in the settlor of the trust, for if all of the children should die during the life of their mother, without leaving lawful issue, the remainder was undisposed of and it would revert to her estate in the absence of a will otherwise disposing of it."

However, the language must be read in the light of the facts to which it applied. As explained, the settlor had expressly reserved a general testamentary power of appointment if her children and their issue predeceased the life tenants. The gifts to all classes of takers were, therefore, expressly conditioned on survivorship. The situation was like those in *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108 (1945), and *Commissioner* v. *Estate of Field*,

324 U. S. 113 (1945), where the settlors expressly reserved powers of appointment on the happening of certain contingencies.

(b) If there be any ambiguity in the instrument the decedent's intent negatives the existence of a reversion.

It is respondent's belief that it is not necessary to go beyond the instrument itself to determine that as a matter of New York law there was never any possibility of reversion to the settlor. However, since petitioner is strongly urging this Court to imply a condition of survivorship of the life tenant in the gifts to the children of deceased brothers and sisters of the settlor, it is entirely proper under the law of New York to look at the circumstances surrounding the creation of the instrument to determine the intent of the settlor in the event that there is an uncertainty as to what he intended by his language. In this connection a leading text writer says (2 Scott on Trusts 828):

> ". . . Where the instrument contains no express provision or where a provision is ambiguous or uncertain in its meaning, resort may be had to extrinsic evidence to determine the terms of the trust. Not only where the trust is created by an instrument *inter vivos* but also where it is created by will, evidence of the circumstances at the time of the execution of the instrument is admissible to determine the intention of the settlor as to matters not expressly and unequivocally covered by the trust instrument. Among the circumstances existing at the time of the execution of the instrument which may be of importance in determining the terms of the trust are the following: the situation of the settlor and of the beneficiaries and of the trustee, such as age, sex, competence, station in life, financial circumstances,

and their relations to each other; the nature and value of the subject matter of the trust; *the purposes for which the trust is created;* the usages of business; the conditions under which the trust is to be administered; the formality or informality, the care or lack of care, with which any instrument containing the manifestation of the settlor's intention is apparently drawn." (italics supplied)

The New York Court of Appeals goes perhaps even farther than Scott would go in admitting extrinsic evidence of intention. In *Matter of Smith*, 254 N. Y. 283 (1930) the court said (p. 289):

> "It is the modern rule that 'with the exception of direct statements of intention, no extrinsic fact relevant to any legitimate question arising in the interpretation of writings and admissible under the general rules of evidence,' can be shut out. (Thayer's Preliminary Treatise on Evidence, 445; Wigmore on Evidence, vol. 5, § 2470; *Matter of Neil*, 238 N. Y. 138; *Dobbins* v. *Pratt Chuck Co.*, 242 N. Y. 106.) Sometimes the rule has been stated with the proviso that extrinsic facts may be shown in cases only where the language alone is of doubtful import. (*Morris* v. *Sickly*, 133 N. Y. 456.) We take this to mean merely that the probable intention of the writer, as indicated by extrinsic facts, may not prevail over the plain meaning of the written word, nor have any force whatever, unless the words incorporated in the writing are susceptible of a meaning which expresses the intent thus disclosed. It has been said by Professor Wigmore: 'The truth had finally to be recognized that words always need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external ob-

> jects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document." (Wigmore on Evidence, § 2470, subd. 3.) The process of interpreting a legal document has been defined as follows: 'to interpret a legal writing is, therefore, first to collect the intent, to discover the writer's meaning; secondly, to ascertain that that meaning is expressed sufficiently.' (On the Principles of Legal Interpretation by F. Vaughan Hawkins, Esq., see Appendix C to Thayer's Treatise, p. 581.)"

In *Bruff* v. *Rochester Trust & Safe Deposit Co.*, 218 App. Div. 67 (1926), the New York Appellate Division said, in the course of construing an *inter vivos* trust instrument (p. 69):

> "A majority [of the court] however, are of the opinion that if the instrument does not clearly provide that Adelia was the owner of the legal title to the income, there is at least an ambiguity in the trust agreement in this respect. Assuming such ambiguity to exist, it is permissible to examine into the surrounding circumstances to determine what was in the mind of the donor at the time she entered into the trust agreement."

And in *McArthur* v. *Gordon*, 126 N. Y. 597 (1891), the court referred to extrinsic evidence surrounding the execution of the instrument creating the trust to determine the intent of its creator (p. 611).

In the instant case the uncontradicted evidence showed, and the Tax Court found, that at the time of creation of the trust the decedent had but recently attained his twenty-first birthday and come into possession of his property, consisting principally of 1,000 shares of stock of Church and Dwight Company, a corporation closely held by the Church

and Dwight families (R. 8). It came to the attention of E. Dwight Church, an older brother of the decedent, that decedent was leading a riotous existence, drinking heavily, squandering his money, and associating with companions of questionable repute (R. 8). Fearful that decedent as a result of his improvidence might dispose of the shares of Church and Dwight stock to persons outside the family circle, E. Dwight Church suggested to decedent that he place the stock in trust in order to safeguard it (R. 8). Decedent cared so little about the stock that he offered at once to give it to his older brother, but the offer was refused and the stock was placed in trust (R. 4). Decedent told the family attorney that he wanted to put the stock in trust to avoid the possibility of his dissipating it (pp. 33-34, typewritten transcript).

In the face of such uncontroverted evidence that the decedent had no personal interest in retaining the stock and that it was only on the insistence of his brother that he retained even a life estate, it is perfectly clear that he never intended to retain an interest in the corpus. In fact the retention of such an interest would have defeated what the Tax Court found to be the decedent's primary motive for placing the stock in trust, namely, to keep him from being able to dispose of it to persons outside the Church and Dwight families. Had he retained a reversion there would still have been the possibility of eventually defeating the primary purpose, and that was clearly not the intent either of the settlor or of his brother who instigated the trust arrangement. Consequently, if there be any doubt as to the proper construction of the instrument, the intent of the settlor resolves that doubt in favor of a construction that negatives any possibility of a reversion.

The retention of the life estate was, of course, not the purpose, but a mere incident of the prime motive, for decedent could not protect *himself* by creating a life estate inasmuch as his life estate was freely assignable and attachable under the well established New York rule that one may not create a spendthrift trust for himself. *Schenck* v. *Barnes*, 156 N. Y. 316 (1898); *Kene* v. *Hill*, 102 App. Div. 370 (1905). Presumably the attorney who drew the instrument, a practicing attorney of twenty-five years' experience (typewritten transcript, pp. 32-33), knew this.

POINT 2

EVEN IF THERE HAD BEEN A REMOTE POSSIBILITY OF REVERSION, THE EXISTENCE OF SUCH A POSSIBILITY WOULD NOT HAVE MADE THE TRANSFER ONE TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH WITHIN THE MEANING OF THE STATUTE.

This point becomes material by assuming, but for the purpose of argument only, that there is a possibility of reversion even though remote,—in other words, by assuming that if decedent had died without issue, without surviving brothers and sisters and without surviving children of brothers and sisters the corpus of the trust would have reverted to his estate.

At the time of decedent's death the corpus of the trust was worth $188,800 (p. 2 of statement attached to ninety-day letter in typewritten transcript). There were sixteen people, ten younger than decedent, who were at that time in direct line to take (R. 3, 14). Actuarially computed, the chance that the corpus would revert to decedent or to his estate because all sixteen might predecease decedent was

worth less than three ten-thousandths of one cent ($.000003-) (R. 12-13).

It has been said many times that taxation is a practical matter. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 212 (1930); *Tyler* v. *United States*, 281 U. S. 497, 503 (1930); *Helvering* v. *Hallock*, 309 U. S. 106, 114 (1940); *Harrison* v. *Schaffner*, 312 U. S. 579, 582 (1941). The Court will recall that on many occasions that principle has been relied upon here by petitioner, both in his briefs and in oral argument. However, he is now urging in effect that a possibility so remote that even an actuary would not value it at as much as half a cent is sufficient to create a tax liability. Evidently the practical is to yield to the absurd when the goal is a tax.

The principle of *de minimis* has received the approval of this Court. *Maish* v. *Arizona*, 164 U. S. 599, 602 (1896); *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607 (1939). It has frequently been applied in the lower federal courts. *F. A. D. Andrea, Inc.* v. *Dodge*, 15 F. 2d 1003, 1005 (C. C. A. 3d, 1926); *Robeson* v. *United States*, 123 F. 2d 991, 993 (C. C. A. 10th, 1941); *Lumaghi Coal Co.* v. *Helvering*, 124 F. 2d 645, 648 (C. C. A. 8th, 1942); *In re United Light & Power Co.*, 51 F. Supp. 217, 225 (Del., 1943); *Porter* v. *Rushing*, 65 F. Supp. 759 (W. Ark., 1946). In fact petitioner himself recognizes the principle in Section 29.56-3 of Income Tax Regulations 111 where he says that in the payment of income taxes a fractional part of a cent, if less than half a cent, may be disregarded. The reason is obvious. He is not giving away anything that belongs to the Treasury. There is nothing to give away.

This case is not like *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, *supra*, or *Commissioner* v. *Estate*

of Field, 324 U. S. 113; *supra*, because there the reversion (expressed as contingent general powers of appointment) had real value. In the first case the actuarial value of the reversion was said to be substantial although the reports do not give the exact amount. In the second, the reversion was worth $24,931 and the corpus $157,453, so that the value of the reversion was approximately 16% of the value of the corpus. It is not like *Estate of Edson Bradley*, 9 T. C. No. 20 (1947), where, in the first of the trusts, the taxpayer conceded that the interest retained by the decedent was worth $325,952, or nearly forty percent of the value of the corpus. Three ten-thousandths of a cent is an amount the equivalent of which could not change hands anywhere in the world except perhaps in fantastically depreciated Chinese currency. Congress could scarcely have meant to impose a tax because of the existence of a theoretical reversion which has no value except to a dialectic gymnast.

The statute says "*intended* to take effect in possession or enjoyment at or after death" (italics supplied). Petitioner urges that Congress did not intend that every gift in which the donor had unconsciously retained a reversion of some value should escape the tax merely because the donor did not mentally intend such a reservation or did not know it existed. While this may be true, yet there must be some point at which the word "intended" is to be given a meaning; otherwise it would be pure surplusage. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word of the statute. *Platt* v. *Union Pacific R. R.*, 99 U. S. 48, 58-59 (1878); *Market Company* v. *Hoffman*, 101 U. S. 112, 115-116 (1879); *United States* v. *Lexington Mill & Elevator Co.*,

232 U. S. 399, 410 (1914); *McDonald* v. *Thompson*, 305 U. S. 263, 266 (1938).* It is not respondent's purpose to indicate the precise point at which the line should be drawn. It is respondent's position, however, that where the theoretical reversion has no value at all in the minds of any sane person, there is clearly no intent, even from a strictly legalistic point of view, to create a reversion and no practical possibility that such a reversion would ever vest in possession and enjoyment. It is only the practical possibility of possession and enjoyment of the corpus which should, under a reasonable interpretation of the statute, be the occasion for the incidence of a tax.

But it may be argued that if the courts are not to have a hard and fast rule such as that for which petitioner contends there is no touchstone* by which each case may be decided—that the lower courts will never know, until this Court has spoken, whether they have placed a decision on the correct side of the dividing line. But certainty is frequently impossible in the application of legal standards. Sometimes it is not even desirable. Nevertheless, the courts have not, for that reason, abdicated their functions in such cases. Courts and juries are continually determining what is reasonable, what is negligent, what is probable,—by the standards of the ordinary man. Is it then so impractical, so disruptive of the processes of tax administration, to permit them to determine whether a theoretical possibility of reversion is so remote and so improbable of enjoyment that the donor must never have intended it? To refuse to permit them to do so is to nullify the express language,

*"Common understanding and experience are the touchstones for the interpretation of the revenue laws." *Helvering* v. *Horst*, 311 U. S. 112, 118 (1940).

of the statute and to interpret it as if the word "intended" were not there.

Moreover, the adoption of a rule of reason in situations like the one here presented is more feasible than in most other instances, for the vast majority of these cases come before a single tribunal—the Tax Court—and the adoption of uniform workable standards is therefore made easier. The Tax Court has had no difficulty with the problem here presented. It has interpreted the statute, in the absence of an expressed intent on the part of the settlor through the use of such a device as an express reservation of a power of appointment, as meaning such a possibility as in the minds of ordinary human beings has some chance of becoming a reality. *Frances Biddle Trust*, 3 T. C. 832, 843 (1944); *Estate of Nettie Friedman*, 8 T. C. 68, 71 (1947). Thus in many cases where the reversion had a small theoretical value which could be translated into terms of exchangeable money the Tax Court has nevertheless deemed the possibility to be so remote as to be beyond the realm of human probability and therefore never intended. See, for example, *Frances Biddle Trust, supra*; *Estate of Harris Fahnestock*, 4 T. C. 1096 (1945); *Estate of Mary B. Hunnewell*, 4 T. C. 1128 (1945); *Estate of Edward P. Hughes*, 7 T. C. 1348 (1946). In other cases where the reversion has been such as to make the possibility of vesting in enjoyment within the comprehension of an ordinary man the Tax Court has resolved the question in favor of the petitioner. *Estate of Thomas P. Leaman*, 5 T. C. 699 (1945); *Estate of John C. Duncan*, 6 T. C. 84 (1946); *Estate of Edson Bradley*, 9 T. C. No. 20 (1947), *supra* (second trust). This is as it should be. It is a procedure which appeals to common sense and is undoubtedly what

Congress would have approved if its members had thought the problem through to that point.

The rule of reasonable intent is not one that appeals only to the Tax Court. The Circuit Court of Appeals for the Second Circuit has recently applied it to a case under section 811(c). *Commissioner* v. *Singer's Estate*, 161 F. 2d. 15 (1947). There the decedent had created two *inter vivos* trusts. In the first he gave successive life estates to his wife Blanche and to himself, with a special power of appointment over the remainder, exercisable by him and Blanche by deed, to his children and their issue. In default of appointment the remainder was given to his children at specified times. There were other limitations over in case these dispositions did not take effect. Subsequently the decedent and Blanche, by deed, irrevocably appointed their three children to receive the principal in equal shares after their deaths, the issue of any deceased child to take the child's share.

The second trust was the same as the first except that Blanche was not given a life estate and the special power of appointment was exercisable by the settlor alone. The decedent married again and exercised the power in the second trust by irrevocably appointing the children of his two marriages to receive the corpus, the issue of any deceased child to take his parent's share, the principal to be so divided as to equalize the amounts received by each child under the two trusts and a third trust not here material. Subsequently the decedent married a third time.

The decedent was survived by three children and one grandchild as issue of the first marriage and two children and two grandchildren as issue of the second,—a total of seven in direct line to take as compared with sixteen in the

instant case. The trust was to be construed under the laws of England and it appeared that if the issue of the first marriage had predeceased the settlor the special power of appointment under the first trust would not have been exhausted because the decedent could then have exercised it again by appointing among children of subsequent marriages. Similarly, with respect to the second trust the power of appointment would not have been exhausted if the issue of both the first and second marriages had predeceased him.

The court held that if the existence of special powers potentially unexhausted at the time of a decedent's death could ever make the corpus includible in his gross estate the statute was not intended to apply to a case where the possibility of the right further to exercise the powers was so remote and improbable. On this phase of the case the court was critical of petitioner's extreme interpretation, saying (pp. 18-19):

> "It appears generally true that now an objective and economic, rather than a subjective, standard of intent, is envisaged. Paul, Federal Estate and Gift Taxation, 1946 Supp., 179; but, even so, a remote power which will actually be exercised only by substitutionary deed in the event of a convulsion engulfing all the several living children and grandchildren —an event obviously not within the decedent's natural contemplation—seems far from the type of disposition at which the statute is directed. Of course the matter is not free from doubt; the Supreme Court may feel that the logic of positions already taken requires it to go so far. But on the basis of the precedents to date, we do not believe that result is foreshadowed."

But even if this Court considers that the logic of positions already taken requires a rule that a reversion which has any value at all is sufficient to create tax liability under the statute, less than three ten-thousandths of one cent is certainly not value. The reversion is valueless. The decedent has not retained the possession or enjoyment, or the possibility of possession or enjoyment, of the corpus and the disposition should be considered to be, as it is in fact, complete.

POINT 3

THE CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE PRINCIPLE OF *DOBSON* v. *COMMISSIONER* AND RELATED CASES.

Under the statute the appellate courts may modify or reverse a determination of the Tax Court only if it is "not in accordance with law". Internal Revenue Code § 1141 (c)(1), 26 U. S. C. § 1141(c)(1); *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 168 (1942); *Dobson* v. *Commissioner*, 320 U. S. 489, 494 (1943); *John Kelley Co.* v. *Commissioner*, 326 U. S. 521, 526-527 (1946). The court below, saying that it was unable to identify "a clear-cut mistake of law" in the Tax Court's decision (R. 18), affirmed without deciding whether a reversion existed or whether, if it existed, the corpus of the trust was includible in the decedent's gross estate. However, it must necessarily have given thought to one or both of those problems because they were the grounds on which petitioner there sought a reversal. At the very least, therefore, the Circuit Court of Appeals must have considered petitioner's propositions of

law to be of dubious validity. Petitioner offers no new argument here and his brief here contains no New York authorities which were not in his brief below.

If it is not possible to identify a clear-cut mistake of law in the Tax Court's decision, the Court of Appeals had no alternative but to affirm. In *Dobson* v. *Commissioner*, *supra*, this Court said (p. 502):

> "... when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. * * * In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible."

In *Commissioner* v. *Scottish American Investment Co.*, 323 U. S. 119 (1944), the Court said (p. 123):

> "There is no charge here that the Tax Court failed to follow the applicable statutes or regulations. No clear cut mistake of law is alleged."

The principle was concisely stated in the concurring opinion of Mr. Justice Frankfurter in *Trust of Bingham* v. *Commissioner*, 325 U. S. 365 (1945), where he said (p. 379):

> "Accordingly, the vital guidance of the *Dobson* opinion was that a decision of the Tax Court should stand unless it involves 'a clear-cut mistake of law.'"

In Point 1 of this brief respondent believes it has demonstrated that the courts of New York would interpret the deed of trust as a complete disposition of the corpus without a reversion. Petitioner has cited no New York authority to the contrary. Nothing in his brief would lead to the conclusion that the Tax Court made a clear-cut mistake of law when it held that the decedent had disposed of his interest in the corpus as well as any man could. In fact, there is no authority in petitioner's brief which, standing alone, would even lead to the belief that *possibly* the instrument created a reversion.

In Point 2 respondent has shown that the reversion, if any, had no value. If it had no value, it was as if it did not exist. If the Tax Court has applied a realistic interpretation of the statute it has not thereby committed any clear-cut mistake of law, for any other interpretation would violate the recognized principle that every word of a statute is to be accorded some meaning when it is possible to do so.

CONCLUSION

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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LOREN C. BERRY,
Of Counsel.

New York, New York.
October 16, 1947.

APPENDIX

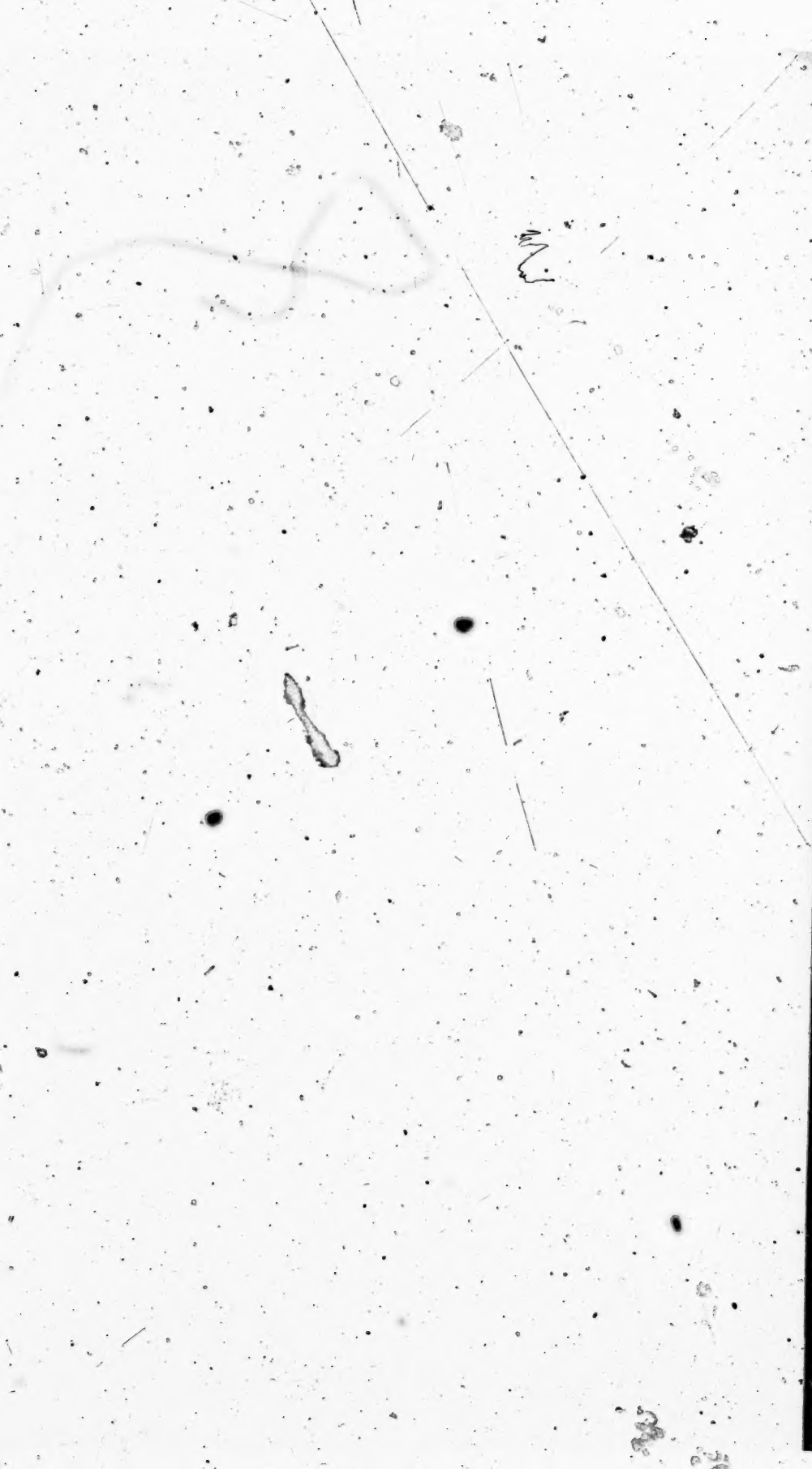
New York Real Property Law

Sec. 40. **When future estates are vested; when contingent.** A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

Sec. 59. **Qualities of expectant estates.** An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession.

New York Personal Property Law

Sec. 11. **Suspension of ownership.** The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator; except that a contingent gift in remainder may be made on a prior gift in remainder, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the interest of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority. Lives in being or a minority in being shall include a child begotten before the creation of the estate but born thereafter. In other respects limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 5

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT ON REARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 5

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT ON REARGUMENT

Statement

This brief is filed pursuant to order of this Court, dated June 21, 1948, directing reargument of this and the companion *Spiegel* case and requesting counsel to discuss particularly certain questions propounded by the Court in so far as they are relevant to the respective cases (Supreme Court Journal, pp. 296-298). The usual statements concerning opinions below, the jurisdiction and the facts are omitted here inasmuch as they are set forth in the brief for respondent which was filed at the time of the first argument. The statute

involved is section 811(c) of the Internal Revenue Code. It and all its predecessors are set forth in Appendix A of this brief. The regulation involved and all its predecessors are set forth in Appendix B.

Questions Presented

The questions propounded by the Court are as follows:

1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, *inter vivos*, did section 811(c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate-tax purposes? That is, did section 811(c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created *inter vivos*, merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

2. Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did section 811(c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate-tax purposes?

3. Did section 811(c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust because the settlor, by its terms, had, in 1924, reserved to himself a right to the

income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

4. Were the joint congressional resolution of 1931 (46 Stat. 1516-1517), and subsequent related estate-tax statutes, intended to be a repudiation of this Court's *May* v. *Heiner* (281 U. S. 238) interpretation of the estate-tax statutes?

5. Did the *May* v. *Heiner* estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in *Helvering* v. *Hallock* (309 U. S. 106)?

6. Under section 811(c) is the "possession and enjoyment" of the corpus of an *inter vivos* trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

7. In the light of this Court's opinion in *Helvering* v. *Hallock* does the *Hassett* v. *Welch* (303 U. S. 303) interpretation of the 1931 congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

8. Assuming that under the "refined technicalities of the law of property" the "possession and enjoyment" of the trust properties here be deemed to have passed to the beneficiaries when the trust was created, are the transfers so

much "akin to testamentary dispositions" as to make them subject to the estate-tax statutes? (See *Helvering* v. *Hallock*, p. 112.)

9. What is the effect of the rulings of *Helvering* v. *Clifford* (309 U. S. 331) upon these trusts?

Outline of Argument

The first question assumes that the settlor retained no interest of any kind. Inasmuch as Mr. Church retained a life estate, the assumption is inapplicable to this case and is presumably intended to apply only to the *Spiegel* case. Respondent will therefore omit any discussion of the first question.

While possibly some of the other questions are directed only to the *Spiegel* case, that is not clear, and respondent will therefore discuss all questions except the first. Respondent will urge that all eight questions be answered in the negative. The following table indicates where the discussion of the particular questions is to be found in this brief:

Question	
1	Not discussed
2	Point 1
3	Point 2
4	Subdivision (b) of Point 2
5	Subdivisions (b) and (c) of Point 2
6	Point 3
7	Subdivision (c) of Point 2
8	Point 4
9	Point 5

While it would appear that by propounding the questions a majority of this Court may have already determined that it will apply neither the *Dobson* rule nor the rule that an appellant may not raise new points of law in this Court, respondent will nevertheless urge those rules briefly herein.

ARGUMENT

POINT 1.

ASSUMING THAT THERE AROSE, BY OPERATION OF NEW YORK LAW A POSSIBLE REVERTER IN FAVOR OF THE SETTLOR'S ESTATE, SECTION 811(c) DOES NOT REQUIRE THAT THE VALUE OF THE CORPUS, IN VIEW OF THE RECORD IN THE CASE, BE INCLUDED IN THE SETTLOR'S GROSS ESTATE FOR FEDERAL ESTATE TAX PURPOSES.

Question 2 does not appear to be concerned with anything but the legal consequences of the existence of a possibility of reverter. If the question is directed to the *Church* case at all, it must be predicated on the assumption that the Tax Court was clearly wrong in finding that Mr. Church, during his lifetime, had disposed of his interest in the corpus as well as any man could and that no interest in the property passed from Mr. Church to the remaindermen at his death (R. 10). In that event the significance of the question would appear to lie in the words "in view of the record in the case".

The record in the case shows that one of Mr. Church's older brothers urged him to go to the family attorney to place the stock in trust so that he might be in no position to dispose of it to persons outside the family circle (R. 4). The record shows that the settlor told the attorney that that was why he wanted to place the stock in trust (p. 33, typewritten transcript

of record).* The record shows that the Tax Court found that that was the settlor's motive in placing the stock in trust (R. 8). The record in the case therefore clearly establishes motive and subjective intent if they be of significance in applying the statute.

If the test is objective the record is equally clear. The possibility of reverter, if any existed, was so fantastically remote that its value was less than three ten-thousandths of a cent (R. 13).**

Respondent has pointed out, in its earlier brief before this Court, that the word "intended" in the statute should not be treated as mere surplusage and that at least it must be construed as referring to a possibility that has some basis in human experience. The record in the case, coupled with New York legal precedents as set forth in respondent's earlier brief, clearly establishes that there was not even a fantastically remote possibility of reverter. If, however, this Court thinks there was, the reverter would still be so remote as to negative the existence of any intention under a realistic objective standard. The Tax Court still adheres to a realistic standard. *Estate of Emma L. Keck*, 10 T. C. No. 144 (1948); *Lucy B. Platt Est.*, 6 T. C. M. 885 (1947).

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*It has been stipulated that either party may refer to parts of the original record on file with this Court which have not been printed. (R. 23-24).

**Petitioner has never denied before this or before either of the lower courts that respondent's actuarial valuation of the possibility of reverter, if any, was correct. At the close of the trial and again before the decision was rendered respondent asked leave to introduce the actuarial testimony but the Tax Court quite evidently deemed it unnecessary (p. 37, typewritten transcript of record; R. 10-14). If, however, this Court deems such valuation to be necessary to the decision of the case there is ample precedent for sending the case back for receipt of the proffered evidence unless petitioner is prepared to concede it. *United States* v. *Wyoming*, 331 U. S. 440, 457-460 (1947); *Hormel* v. *Helvering*, 312 U. S. 552, 560 (1941).

POINT 2.

SECTION 811(c) OF THE INTERNAL REVENUE CODE, AS IT EXISTED IN 1939, DID NOT REQUIRE THE INCLUSION IN THE SETTLOR'S GROSS ESTATE OF THE CORPUS OF THE TRUST MERELY BECAUSE THE SETTLOR HAD, IN 1924, RESERVED TO HIMSELF A RIGHT TO THE INCOME OF THE TRUST UNTIL HIS DEATH.

Question 3 asks whether section 811(c) of the Internal Revenue Code requires the inclusion of the corpus of the trust in the gross estate because of the settlor's reservation of the life income. Questions 4, 5 and 7 are devoted to subordinate elements of the same question. Respondent will therefore answer all four questions under this single point by urging that *May* v. *Heiner*, 281 U. S. 238 (1930), should be followed in the absence of legislation abrogating it, that the amendments to the earlier counterpart of section 811(c) which were made by the Joint Resolution of March 3, 1931 and subsequent related enactments were not intended to abrogate *May* v. *Heiner* as to trusts created before March 3, 1931 and that *Helvering* v. *Hallock*, 309 U. S. 106 (1940), should not be deemed to be a repudiation of *Hassett* v. *Welch*, 303 U. S. 303 (1938).

(a) *May* v. *Heiner* should be followed in the absence of legislation abrogating it.

The Church trust was established in 1924 and Mr. Church died in 1939. The trust involved in *May* v. *Heiner* had been established in 1917 and the settlor had died in 1920. Both trusts had therefore been created after the enactment of the first estate tax law. In *May* v. *Heiner* the settlor had granted the life income to her husband and then to herself after her husband's death, with remainder to her four children, their

distributees or appointees. This Court held, on the authority of *Nichols* v. *Coolidge*, 274 U. S. 531 (1927) and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), that it was at least doubtful whether Congress intended, by section 402(c) of the Revenue Act of 1918, to tax the corpus when the settlor had surrendered all power of disposition of the corpus long before her death. The court quoted from its language in *Reinecke* v. *Northern Trust Co.* to the effect that "That doubt must be resolved in favor of the taxpayer * * *" (281 U. S. 238, 245).

The decision in *May* v. *Heiner* was unanimous on the part of the then eight members of this Court. Approximately eleven months later the same court, with the addition of Mr. Justice Roberts who had been appointed by reason of the vacancy created by the death of Mr. Justice Sanford, unanimously applied the rule of *May* v. *Heiner* in a series of three cases which raised the same question. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782 (1931); *Morsman* v. *Burnet*, 283 U. S. 783 (1931); and *McCormick* v. *Burnet*, 283 U. S. 784 (1931). Those cases arose under sections 402(c) of the Revenue Act of 1921 (*Northern Trust Co.* and *McCormick*) and 302(c) of the Revenue Act of 1924 (*Morsman*).

Respondent does not take the position that the language of the statute as it existed before March 3, 1931 necessarily dictated the construction which was placed upon it by this Court in those four cases. For eighteen years legal scholars have discussed that proposition, with varying conclusions.*

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*Knouff, *Death Taxes on Completed Transfers Inter Vivos*, 36 Mich. L. Rev. 1284, 1301 (1938); Rottschaefer, *Taxation of Transfers Taking Effect in Possession at Grantor's Death*, 26 Iowa L. Rev. 514, 516 (1941); Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax*, 32 Col. L. Rev. 1332, 1338 (1932); Lowndes, Tax

There was at the time no ascertainable congressional intent. Prior to *May* v. *Heiner* there had been decisions in the courts of six states which dealt with irrevocable *inter vivos* trusts and held that similar language in the state statutes required the imposition of the tax upon the coming into enjoyment of the corpus of the trust at the termination of the settlor's reserved life estate.* But the state death duties were inheritance or legacy taxes—that is, taxes measured by the interests to which living persons succeeded by reason of the death of the donor. The modern federal death duty, on the other hand, which commenced with the Revenue Act of 1916, was, at least until March 3, 1931, considered to be only an estate tax—that is, a tax measured by property which passed from the decedent at

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Avoidance and the Federal Estate Tax, 7 Law & Contemp. Prob. 309, 314 (1940); Eisenstein, *Estate Taxes and the Higher Learning of the Supreme Court*, 3 Tax L. Rev. 395, 449 (1948).

*Forty-two of the forty-eight states had inheritance tax laws in the form of a tax on the right of succession which were effective in or prior to 1916, H. R. Rep. No. 922, 64th Cong., 1st Sess. (1916), 1939-1 Cum. Bull. (Part 2) 22, 25. Forty state statutes were listed in the petitioner's brief, page 20, in this Court in the case of *Hassett* v. *Welch*, 303 U. S. 303 (1938), as containing the phrase "intended to take effect in possession or enjoyment at or after the death of the grantor" or similar language; to these may be added North Carolina P. L. 1915, c. 285, Sec. 6. The statutes of Louisiana, La. Laws 1904, Act No. 45, page 102, did not include the quoted clause.

The courts of the various states up to 1930 construed the phrase "intended to take effect in possession or enjoyment at or after the death of the grantor" or similar language as making irrevocable transfers in trust under which the grantor reserved a life estate taxable under these statutes to the remaindermen with respect to the shares which they received. *The People* v. *Northern Trust Co.*, 330 Ill. 238, 161 N. E. 525 (1928); *In re Estate of Marshall*, 179 Minn. 233, 228 N. W. 920 (1930); *Douglas County* v. *Kountze*, 84 Neb. 506, 121 N. W. 593 (1909); *In re Miller's Estate*, 43 Nev. 45, 185 Pac. 565 (1919), aff'd without discussion of this point in 256 U. S. 222 (1921); *Carter* v. *Bugbee*, 91 N. J. L. 438, 103 Atl. 818 (1918), aff'd 92 N. J. L. 390, 106 Atl. 412 (1919); *Matter of John C. Stephan*, 121 Misc. 596 (Surr. Ct., N. Y. County, 1923).

his death and, as a protection to the revenue, by property which he had conveyed during life in order to avoid the estate tax.

The distinction between the two types of taxes had been pointed out by this Court in *Knowlton* v. *Moore*, 178 U. S. 41, 49-50 (1900), which involved the interpretation of the provisions of the War Revenue Act of 1898 (30 Stat. 448) imposing death duties. The Court construed the 1898 Act as an inheritance tax statute rather than as an estate tax statute.

With this distinction between an estate and an inheritance tax in mind Congress enacted the Revenue Act of 1916 which imposed for the first time the modern system of federal death duties (39 Stat. 777). In the report of the Committee on Ways and Means it was made abundantly clear that Congress intended to enact an estate tax law, not an inheritance or legacy tax law.* The report stated (H. R. Report No. 922, 64th Cong., 1st Sess. (1916), 1939-1 Cum. Bull. [Part 2] 22, 25):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.
>
> "The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal Government and the various States, and the

*The Treasury Department so understood it. Article IV of U. S. Treas. Reg. 37 (revised May, 1917) says, "This is not an inheritance tax, and the interests of separate beneficiaries and the manner of their taking have no bearing upon the question of liability to tax on the amount of tax due. This is a transfer tax in a lump sum resting upon the decedent's whole net estate computed according to sections 202 and 203 of the Act."

same can be readily administered with less conflict than a tax based upon the shares."

And this Court in a series of decisions recognized that Congress had enacted an estate, rather than an inheritance, tax. *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921); *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50 (1924); *Edwards* v. *Slocum*, 264 U. S. 61, 62 (1924); *Nichols* v. *Coolidge*, 274 U. S. 531, 541 (1927); *Chase National Bank* v. *United States*, 278 U. S. 327, 334 (1929). As will hereinafter be demonstrated, this fact seems to have had a profound effect on the construction of the words "intended to take effect in possession or enjoyment at or after death" by this Court for more than twenty years.

The language was not new in federal legislation. Similar language is to be found in an inheritance tax law adopted by Congress in 1862 (12 Stat. 432, 485), having presumably been borrowed from the language of Pennsylvania and Maryland inheritance tax laws enacted in 1826 and 1844, respectively (Pa. Acts, 1825-6, c. 72; Md. Laws 1844-5, c. 237).* Such language had been reenacted by Congress in 1862 (12 Stat. 432, 485), again in Section 124 of the Revenue Act of 1864 (13 Stat. 223, 285), and again in 1898 (30 Stat. 448, 464), but this Court was not called upon to interpret its meaning until after 1916. When the problem finally arose, logic appeared to dictate the solution. The new death duty was an estate tax measured by what passed from the decedent by reason of death rather than by what the donees, legatees and distributees secured by reason of death. Accordingly this Court held

*Note, *Origin of the Phrase, "Intended to Take Effect in Possession or Enjoyment at or after . . . Death" (Section 811(c), Internal Revenue Code)*, 56 Yale L. J. 176 (1946).

that it was contrary to the congressional intent to include in the measure of the tax property which the decedent did not own at death except in cases where the property had been given with the purpose of avoiding the tax. *Llewellyn* v. *Frick*, 268 U. S. 238 (1925); *Shukert* v. *Allen*, 273 U. S. 545 (1927); *Nichols* v. *Coolidge*, 274 U. S. 531, *supra*; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*.

In *Llewellyn* v. *Frick*, *supra*, the Court refused to construe section 402(f) of the Revenue Act of 1918 (which became law February 24, 1919) as taxing the proceeds of insurance on the life of the decedent when the policies had been irrevocably assigned before the act was passed.

In *Shukert* v. *Allen*, *supra*, the Court refused to construe section 402(c) of the 1918 Act as applying to trust property which the decedent did not own at death, saying (p. 547):

> "The transfer was immediate and out and out, leaving no interest remaining in the testator. The trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the Circuit Court of Appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust. See Gray, The Rule Against Perpetuities, §108(3). It seems plain from the little evidence that was put in that the testator was not acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that being fifty-six years old, if he thought about it, he would have con-

templated the possibility or probability of his being dead before the emergency might arise. Of course it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute. There certainly is no transfer taking effect after his death to be taxed under §401."

In *Nichols* v. *Coolidge, supra,* the decedent and her husband had conveyed real and personal property to trustees in 1907, reserving a life estate and granting the remainders to their children. In 1917 they had assigned the life estate to the children. The decedent died in January 1921. The Court refused to construe section 402(c) of the 1918 Act as taxing the remainder interests merely because they came into enjoyment when she died, saying (pp. 541-542):

"Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results.

* * *

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be

no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died See *Frew* v. *Bowers*, 12 Fed. (2d) 625."

In *Reinecke* v. *Northern Trust Co.*, *supra*, the decedent had created trusts in 1919 with life interests in others and remainders over at or after her death. She died in 1922. The Court refused to construe section 402(c) of the 1921 Act as taxing the corpus of the trusts merely because their enjoyment depended upon the termination of precedent estates the continuance of which was related to the date of death of the settlor. The Court there said (pp. 347-348):

"In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *N. Y. Trust Co.* v. *Eisner*, 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

"It is of significance, although not conclusive, that the only section imposing the tax, §401, does so on the net estate of decedents, and that the miscellaneous items

of property required by §402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402(c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. That doubt must be resolved in favor of the taxpayer."

It was to be anticipated, therefore, that when cases involving a reserved life estate arose the Court would hold that, in the absence of evidence that the gift was made in contemplation of death, the corpus of the trust would not be included in the gross estate inasmuch as it was not part of the property passing from the decedent at his death.

So when *May* v. *Heiner* and other cases involving reserved life estates came before this Court in 1930 and 1931 a unanimous court held four times that Congress did not intend to tax gifts of the corpus which had been made irrevocably before death without intent to avoid death duties. To have held

otherwise would have meant that the tax was not measured solely by what passed from the decedent at death but by what came into the possession or enjoyment of others by reason of his death.

The rationale of *May* v. *Heiner*, *Reinecke* v. *Northern Trust Co.* and similar cases discussed hereinabove continued to be followed by this Court for many years. See, for example, *Helvering* v. *Helmholz*, 296 U. S. 93 (1935), and *Hassett* v. *Welch*, 303 U. S. 303 (1938).

Respondent reiterates that it does not assert that the construction of the successive revenue acts by this Court for more than twenty years was the only construction which could properly have been placed upon them. But respondent does urge that those decisions were made by unanimous courts after able and thorough presentation of the issues by counsel for both sides, that the construction which the Court adopted was tenable and that this Court should therefore follow the precedents which it has established. *Cf. Helvering* v. *Hallock*, 309 U. S. 106, 119-121 (1940).

No constitutional issue and no issue involving the life or liberty of the individual is involved. A clearer case for the application of stare decisis can scarcely be imagined. Congress was free to change the law if it so desired. In the absence of such a change those concerned were entitled to rely upon the construction of the statute as settled and to act accordingly. An unnecessary degree of uncertainty is bound to result if the long established interpretation of the statutes is to be repudiated merely because those who now occupy the seats of judgment would now arrive at an opposite conclusion if the question were now one of first impression.

This is not to deny that upon the adoption by Congress of the Joint Resolution of March 3, 1931 it became the duty of this Court to decide whether the rule of *May* v. *Heiner* and of

the three decisions of March 2, 1931 which followed *May* v. *Heiner* had been abrogated.

(b) The Joint Resolution of March 3, 1931 and subsequent related estate tax statutes were not intended to apply to trusts created before March 3, 1931.

The subsection as amended on March 3, 1931 is set forth in Appendix A. The new matter is in italics.

The Court has asked whether the joint resolution was intended to be a repudiation of its *May* v. *Heiner* interpretation. The resolution was undeniably intended to tax trusts of the same type created in the future.* To that extent it was an expression of the will of Congress that *May* v. *Heiner* should no longer be the law. But there is no evidence that Congress intended to say that *May* v. *Heiner* never was the law or that the amendment should apply to irrevocable trusts already created.* In fact, what evidence there is, is to the contrary and, on that evidence, the seven justices who participated in the decision of *Hassett* v. *Welch* were unanimous in holding that *May* v. *Heiner* was still the law as to irrevocable trusts created before the enactment of the joint resolution. The arguments on both sides of the question were exhaustively made in the briefs in *Hassett* v. *Welch* and little further enlightenment on the subject seems to be available.

The joint resolution was enacted hurriedly by a retiring Congress. It was occasioned in part by the three unanimous decisions of this Court rendered only one day before its enactment in which the Court had affirmed and applied the rule of *May* v. *Heiner*. There were no committee reports on the

*"The contemporaneous statements of persons drafting the resolution, which perhaps should be given special weight, show pretty clearly that only a prospective operation was intended for the resolution." 1 Paul, *Federal Estate and Gift Taxation* 340 (1942).

resolution and, as far as respondent has been able to ascertain, no public hearings were held. However, a communication from the then Acting Secretary of the Treasury to the Speaker of the House of Representatives and the statements which were made on the floors of the House and the Senate by those in charge of the bill are enlightening.

In submitting the proposed joint resolution to the Speaker of the House of Representatives with the request that it be enacted, the Acting Secretary of the Treasury purported to explain the meaning of the decisions in *May* v. *Heiner*, *Burnet* v. *Northern Trust Co.* and *McCormick* v. *Burnet* and then said [74 CONG. REC. 7198 (1931)]:

> "It is believed desirable, in view of the character of these transfers and in order to prevent tax evasion, that they be included in the statute. The Treasury has, therefore, drafted a proposed joint resolution, which is inclosed, amending the statute so as to include such transfers."

It will be noted that the Treasury did not seem to be concerned with trusts created for reasons dissociated from estate tax evasion. It was concerned with the possibilities of deliberate tax evasion inherent in the creation of trusts with reserved life estates. The inference is that the Treasury felt that even where such a gift was made to evade the estate tax the representatives of the estate might succeed in convincing the courts that the gift had been made for other motives and was therefore not made in contemplation of death. The Treasury obviously wanted a statute that would eliminate the necessity for reviewing the motives behind the gift.

The same attitude is reflected in the explanation made on the floor of the House by a member of the Committee on Ways and Means who had charge of the joint resolution. MR. Hawley said (74 CONG. REC. 7198, *supra*):

> "It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

It will be noted that Mr. Hawley feared that many would "proceed to execute trusts" to escape the estate tax. The tenor of his language was prospective. And when Mr. Sabath inquired as to the scope of the resolution, Mr. Hawley replied (*id.* p. 7198):

> "It provides that *hereafter* no such method shall be used to evade the tax." (Italics supplied.)

Mr. Hawley was obviously referring to trusts created in the future, for a settlor who had already established such a trust could scarcely be said to have thus used such a method "hereafter".

Immediately after the resolution was adopted by the House, Mr. Garner made a statement in explanation of the resolution which may have been intended for the enlightenment of the Senate. Among other things he said (*id.* p. 7199):

> "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it. But I do hope that when this matter is

> considered in the Seventy-second Congress we may be able to pass a bill that will make it retroactive."

It may be urged that the decision not to make the amendment retroactive was motivated by the fact that the Court on the previous day had said, with respect to each of the three cases then decided, that there was "no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved . . ." (283 U. S. 783, 784). Such language certainly contained an implication that Congress might lack the power to impose such a tax on the corpus of trusts already created. More probably the decision not to make the amendment retroactive was motivated by the fact that those members of the Senate who were known to be hostile to federal estate taxation would, by stressing the unfairness of levying an estate tax on the corpus of trusts already created without intent to avoid the estate tax, be able to muster enough votes to prevent the passage of the resolution. Mr. Garner seems to have indicated as much when he said that the Committee on Ways and Means had not made the resolution retroactive because "we were afraid that the Senate would not agree to it" (74 CONG. REC. 7199, *supra*). When the resolution reached the Senate, two senators did take the occasion to voice their distaste for federal estate taxation generally (*id.* p. 7079).

But, regardless of the motive, it is clear that the House understood that the amendment would not affect trusts already created. After Mr. Garner's explanation as to the purpose and intent of the resolution, the following exchange took place (*id.* p. 7199):

> "Mr. La GUARDIA. This is to give timely notice that in the next Congress it will be made retroactive?

"Mr. GARNER. I have strong hopes that the next Congress will make it retroactive.

"Mr. BLACK. Was the Supreme Court decision based on a constitutional question, or a discussion of the statute?

"Mr. GARNER. It was on the statute itself, and was not constitutional."

Senator Smoot of the Committee on Finance had charge of the resolution on the floor of the Senate. He repeated *verbatim* the hereinabove quoted language of Mr. Hawley to the effect that (*id.* p. 7078)

> "... it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance, therefore, that this situation be corrected and that this obvious opportunity for tax avoidance be removed."

The resolution passed the Senate after a short discussion which gives no further enlightenment.

The hope expressed by Messrs. Garner and LaGuardia that a succeeding congress would enlarge the amendment by making it retroactive was never realized. While the wording of section 302(c) of the Revenue Act of 1926 as amended by section 803(a) of the Revenue Act of 1932 (47 Stat. 279; see Appendix A) was somewhat different from the wording of section 302(c) of the Revenue Act of 1926 as amended by the joint resolution, the changes were not significant. They indicate no intention to broaden the scope of the provisions now under consideration. In explaining the changes, both the House and the Senate committee reports said [1939-1 Cum. Bull. (Part 2) 490, 532]:

> "The purpose of this amendment to section 302(c) of the Revenue Act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect."

The reports then went on to explain such change.

The 1932 bill was presented in the House by Mr. Crisp who stated [75 CONG. REC. 7241 (1932)]:

> "The only retroactive provision in this bill is the one dealing with the valuation of estates, on account of the great drop in the price of securities."

On the clerk's reading of the bill there was little discussion. Mr. Crisp presented a last-minute amendment, the effect of which was to remove the conclusive presumption that gifts made within two years before death were made in contemplation of death (*id.* p. 7242). Other than that there is nothing to be found in the Congressional Record with respect to the 1932 amendment of section 302(c) of the Revenue Act of 1926.

There were no further amendments to section 302(c) of the Revenue Act of 1926. In 1939 it became section 811(c) of the Internal Revenue Code. Section 811(c) has since remained unchanged.

The Treasury, which had drawn the Joint Resolution of March 3, 1931, was well aware of its limited scope. On May 22, 1931, the Secretary of the Treasury approved T. D. 4314, X-1 Cum. Bull. 450 (1931), which set forth the language of the joint resolution and then said (p. 451):

"In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S., 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S. 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, i.e., to such transfers coming within the amendment as were made *after* 10.30 p.m., Washington, D. C., time, March 3, 1931.

"Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."

This, it is submitted, is a complete answer to petitioner's suggestion (Brief, p. 32) that the discussion on the floor of the House concerning retroactivity had reference to the taxation of estates of those who had already died rather than to the taxation of trusts which had already been created. The motive in passing the resolution, as Mr. Hawley had explained, was the fear that "many persons will proceed to execute trusts" (74 CONG. REC. 7198, *supra*). The Treasury well knew this, so it inserted a provision in T. D. 4314, *supra*, to make it plain that the Joint Resolution of March 3, 1931 would apply only to trusts made after March 3, 1931.

In pursuance of the promise contained in the last paragraph of T. D. 4314, *supra*, Article 18 of Regulations 70 (revised 1929) was amended on April 11, 1932, by T. D. 4336, XI-1 Cum. Bull. 329. Article 18 as so amended read:

"Art. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 p. m. Washington, D. C. time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

"Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included."

It was two months later (June 6, 1932) that section 302(c) was amended by section 803(c) of the Revenue Act of 1932 (47 Stat. 169, 279). Evidently the Treasury saw nothing significant in the amendment in so far as gifts with reserved life estates were concerned, for it made no immediate attempt to change the regulation. But twenty-nine months after the passage of the Revenue Act of 1932 it seems to have concluded that the time was ripe to try to apply the statute retroactively. In view of what had been said in Congress when the March 3, 1931 Joint Resolution was adopted, however, the Treasury did not venture to go all the way. It went only part of the way by providing that if the trust was created before March 3, 1931 the corpus would not be taxed if the settlor died before June 6, 1932, the date of passage of the 1932 Act; but if the

settlor lived longer, the corpus would be taxed. Such was the substance of Article 18 of Regulations 80, approved November 7, 1934. The exact language of the article was as follows:

> "**Art. 18. Transfers with possession or enjoyment retained.**—(a) *Transfers included.*—The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)
>
> "(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. (See section 506 of the Revenue Act of 1934.)"

Hassett v. *Welch*, 303 U. S. 303 (1938), was the test of the new thought, for there the decedents had established trusts with reserved life estates in 1930 and 1924 and had died, respectively, on June 4, 1933, and November 20, 1932. This Court reviewed the circumstances surrounding the enactments of March 3, 1931, and June 6, 1932 and concluded unanimously that Congress did not intend by either of those amendments to tax the corpus of trusts created before March 3, 1931.

The government urged that because section 302(h) of the 1926 Act [now section 811(h) of the Code] said that, except as otherwise specifically provided, the provisions of section 302 should apply to transfers whether made before or after February 26, 1926, the amendments of 1931 and 1932 were clearly intended to be retroactive. This Court held otherwise, saying (pp. 313-314):

> "It will be remembered that the Joint Resolution of 1931 amended § 302(c) of the Act of 1926 to cover transfers such as are here involved. It made no reference to any other portion of that Act. Since § 302(c) in its original form was, by § 302(h), made applicable to transfers whether made before or after the Act of 1926, the contention is that it has like operation and effect as respects the provision added to it by the amendment. And the same argument is advanced with respect to the amendment of subsection (c) by the Act of 1932.
>
> "Resort is had to canons of constructions as an aid in ascertaining the intent of the legislature. It may occur that the intent is so clear that no such resort should be indulged, and the Government claims this is such a case. The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid. A well-settled canon tends to support the position of respondents: 'Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent.' The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended.

"In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer, we feel bound to hold that the Joint Resolution of 1931 and § 803 (a) of the Act of 1932 apply only to transfers with reservation of life income made subsequent to the dates of their adoption respectively."

It is submitted that the Court could not properly have held otherwise in view of the expressed intent of Congress that the amendment of March 3, 1931 should not be applied retroactively.

As a result of this Court's decision in *Hassett* v. *Welch*, the Treasury, on October 24, 1938 by T. D. 4868, reworded Article 18 of the 1937 edition of Regulations 80 to read as follows (1938-2 Cum. Bull. 355):

"**Art. 18. Transfers with possession or enjoyment retained.**—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 302(c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

"(1) At any time after 10.30 p.m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

"(2) At any time after 5 p.m., eastern standard time, June 6, 1932, and such retention or reserva-

tion is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a 'period not ascertainable without reference to his death' may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

"The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

"If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate."

Except for clerical changes, the language of section 81.18 of the present Regulations 105 is identical. The Treasury apparently does not consider *Helvering* v. *Hallock*, 309 U. S. 106 (1940), to be a repudiation of *Hassett* v. *Welch*, 303 U. S. 303 (1938), for almost nine years have expired since that decision was rendered and there has been no change in the regulation. Moreover, it is only at the invitation of this Court that the Treasury is now urging that *Helvering* v. *Hallock* is controlling with respect to reserved life estates.

(c) *Helvering* v. *Hallock* should not be deemed to be a repudiation of *May* v. *Heiner* and *Hassett* v. *Welch*.

In *May* v. *Heiner* the Court decided that Congress did not intend to measure the estate tax by the corpus of an *inter vivos* trust merely because the settlor had reserved a life estate. In the three decisions of March 2, 1931 the Court unanimously reaffirmed its views in that respect. On March 3, 1931 Congress dealt with that specific situation. It changed the law as to trusts created in the future, but said that the amendment was not intended to apply to trusts already created. The hope was expressed by some that a later congress would further amend the law so as to apply it to trusts already created (74 Cong. Rec. 7199), but that was not done. It is therefore difficult to see how the present Court, without usurping the legislative function, can treat the statute as if the further amendment had been made. If it cannot properly do so without *Helvering* v. *Hallock*, it is difficult to see how anything said in that case could logically supply the lacking justification.

The amendment of March 3, 1931 dealt with a reserved life estate. *Helvering* v. *Hallock* dealt with an entirely different, albeit related, situation. The question in *Helvering* v. *Hallock* was whether an *inter vivos* gift of a remainder interest was complete when the donor had provided that if he survived another the corpus was to be returned to him. The Court in effect decided that such a gift of the corpus was not complete and never could be complete until the donor died. It was a gift intended to take effect in possession or enjoyment at or after death since none could say during the lifetime of the donor that another would surely receive it.

If the matter of a reserved life estate were one of first impression certain generalizations to be found in the opinion in *Helvering* v. *Hallock* might be urged as foreshadowing a

conclusion contrary to that reached in *May* v. *Heiner*. For example, this Court said (309 U. S. 106, 112):

> "The inescapable rationale of this decision, rendered by a unanimous Court [referring to *Klein* v. *United States*, 283 U. S. 231] was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise."

The petitioner might have quoted that language as authority for concluding that the law was, from the beginning, a combination of estate and inheritance tax. From that he could have argued that Congress intended to tax not only what passed from the decedent at death but also what others enjoyed because he had died. But inasmuch as the very court which decided *Klein* v. *United States*, 283 U. S. 231 (1931), had only five weeks earlier unanimously decided *Northern Trust Co., Morsman and McCormick* without any perception of inconsistency, such an argument lacks persuasive force.

Again, this Court said in *Hallock*, when referring to section 302(c) (p. 111):

> "The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment."

This generalization might also be used by the petitioner if the matter of a reserved life estate were one of first impression, for it too might be interpreted as meaning that section 302(c) is an inheritance tax statute rather than an estate tax statute. But here again the force of the argument is spent by *Klein* v. *United States*, for this Court in the next paragraph of its *Hallock*

decision recognizes that *Klein* is one of the cases that begot the difficulties. *Klein* was rightly decided. Yet the court which decided *Klein* decided *Northern Trust Co.*, *Morsman* and *McCormick*. To it there was nothing inconsistent.

Generalizations may usually be lifted from far-reaching opinions and, according to the will of him who lifts them, be expanded or contracted to apply to a particular case. That is their vice. It is respondent's position that a generalization ought not to be used to solve a question on which Congress has evidenced its intent by legislation.

It is not at all difficult for the Court to find a workable pattern without doing violence either to *Helvering* v. *Hallock* or to the Joint Resolution of March 3, 1931. *Helvering* v. *Hallock*, in the absence of corrective legislation, may be applied to cases where the donor consciously or unconsciously retains a real possibility of getting the corpus back. *Hassett* v. *Welch* may be applied to cases where the donor before March 3, 1931 irrevocably disposed of the corpus but retained an interest in the income. It is a workable pattern, though to some it may be illogical. It is entirely lawful for Congress to pursue a policy which taxes some trusts because they were set up after a certain date and fails to tax others because they were set up before such date.

Respondent draws considerable comfort from what was actually held in *Helvering* v. *Hallock*. It will be recalled that *Klein* v. *United States* was decided in 1931. The *St. Louis Union Trust* cases,* which appear to conflict with *Klein*, were decided only four years later. *Hallock*, which attempted to resolve the difficulty, was decided in 1940. The Court in *Hallock* was faced with inconsistent decisions rendered within

Helvering v. *St. Louis Union Trust Co.*, 296 U. S. 39 (1935), *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48 (1935).

a relatively short space of time. It had to decide whether stare decisis required adherence to the later cases even though they appeared to be unsound. In resolving that problem the Court said (pp. 119-121):

> "We recognize that *stare decises* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decises* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.
>
> "Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions.
>
> "Nor does want of specific Congressional repudiations of the *St. Louis Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. To explain the cause of non-action by Congress when Congress

itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reexamination, by this Court of distinctions which it had drawn. Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

Unlike *Hallock*, the Court here has no recent decision which conflicts with a sounder prior doctrine. The decisions are all in accord. The oldest (*May* v. *Heiner*) was rendered eighteen years ago; the youngest (*Hassett* v. *Welch*) eleven.

Unlike *Hallock*, the Court here has a rule of decision around which, by the accretion of time, substantial interests may have established themselves. Presumably many who had, without thought of estate tax avoidance, created trusts before 1931 with reserved life estates could have disposed of those life estates by irrevocable assignment had they not relied upon the expressed limited scope of the joint resolution and the recognition of that limit by this Court in *Hassett* v. *Welch*. Mr. Church was potentially of that group.

Unlike *Hallock*, the earlier decisions were not followed by silence on the part of Congress. Congress reacted promptly.

But when it did so, it expressed the intention that the change should not be retroactive.

Unlike *Hallock*, the earlier decisions involved in this case were not followed by Treasury inaction. It was the Treasury which asked Congress to change the law.

The tests which this Court applied in *Helvering* v. *Hallock* to demonstrate that stare decisis was not appropriate there indicate that stare decisis fits the instant situation like a glove.

Petitioner urges (Brief, pp. 45-48) that *May* v. *Heiner* may be repudiated without repudiating *Hassett* v. *Welch* because the latter dealt only with the retroactive application of the corrective legislation. This, however, is tantamount to saying that the Court, in *Hassett* v. *Welch*, was indulging in an intellectual exercise devoid of any practical application. If the Court which decided *Hassett* v. *Welch* did not deem *May* v. *Heiner* to be the law in the absence of corrective legislation, why should it have concerned itself with the question whether the joint resolution and subsequent statutes were retroactive?

Four Circuit Courts of Appeals, the Court of Claims and the Tax Court have said that *Hassett* v. *Welch* and *May* v. *Heiner* are still the law and that they were not overruled by *Hallock*. *Commissioner* v. *Singer's Estate*, 161 F. 2d 15, 17 (C. C. A. 2d, 1947); *Commissioner* v. *Kellogg*, 119 F. 2d 54, 56 (C. C. A. 3d, 1941); *Schultz* v. *United States*, 140 F. 2d 945, 948 (C. C. A. 8th, 1944); *United States* v. *Brown*, 134 F. 2d 372, 373 (C. C. A. 9th, 1943); *New York Trust Co.* v. *United States*, 51 F. Supp. 733, 735-736 (Ct. Cls., 1943); *Estate of James H. Matthews*, 3 T. C. 525, 539 (1944).

POINT 3.

UNDER SECTION 811(c) THE "POSSESSION AND ENJOYMENT" OF THE CORPUS OF AN *INTER VIVOS* TRUST IS NOT "INTENDED TO TAKE EFFECT * * * AT OR AFTER" THE SETTLOR'S DEATH, WHERE HE RESERVES TO HIMSELF A LIFE ESTATE AND NAMES HIMSELF AS CO-TRUSTEE WITH SUCH CONTROL AND ADMINISTRATIVE POWERS OVER THE CORPUS AND INCOME AS ARE HERE VESTED.

Question 6 couples the co-trusteeship with the postponement of enjoyment of the corpus. As already pointed out, Congress did not intend, by the Joint Resolution of March 3, 1931, that a trust created before that date should be taxed because the settlor had reserved a life estate. If that be granted, the question is whether the co-trusteeship is in itself fatal.

Question 6 seems to assume that the settlor has "broad control and administrative powers over the corpus and income" of the trust. If the question be directed to the Church trust, respondent submits that the assumption is not in accord with the evidence in the case.

There were three trustees designated in the instrument. One was the decedent. As a beneficiary of the trust he was entitled only to the income (R. 5). The other two trustees were brothers of the decedent. They were entitled to share in the corpus if, as actually happened, they survived the settlor and the settlor died without issue (R. 5). If they predeceased the settlor and he died without issue, their children took shares of the corpus (R. 5). Their interests and the interests of their children as potential remaindermen were thus in many respects adverse to the interest of the settlor as life beneficiary. In the absence of express provisions to the contrary in the trust

indenture, whatever discretionary powers the settlor had as trustee were under the law of New York exercisable only with the concurrence of his co-trustees. *Andrews* v. *Kirk*, 160 N. Y. Supp. 434 (not officially reported), aff'd 175 App. Div. 975 (1916), aff'd 221 N. Y. 641 (1917); *Fritz* v. *City Trust Co.*, 72 App. Div. 532 (1902), aff'd 173 N. Y. 622 (1903); *Matter of Amanda M. Johnson*, 123 Misc. 834 (Surr. Ct., Clinton County, N. Y., 1924); 3 Warren's Heaton on Surrogates' Courts 36-37 (6th Ed., 1941). The single exception to this rule of unanimity is where the trustees cannot agree on voting shares of stock held by the trust. In that event a majority of the trustees may vote the stock. New York Stock Corporation Law, sec. 48.

The trust powers were for the most part powers which are customarily granted to trustees,—to hold the original assets if the trustees wished to do so; to sell at public or private sale; to compromise claims; to exchange the trust securities in reorganizations; to vote the stock; and to employ counsel (R. 5-6). Such powers were required to effectuate the purposes of the trust and would have been implied if they had not been expressed. *Spencer* v. *Weber*, 163 N. Y. 493, 502 (1900); 3 Bogert on Trusts and Trustees (Part 1) 406-412 (1946); 2 Scott on Trusts, 982-986, 1025 (1939).

In addition, there were three powers which belonged exclusively to the settlor. The first was to prevent the sale of any of the securities constituting the trust (R. 5). The only securities that were ever in this trust were stock in Church & Dwight Co., Inc., but the reservation of the right to veto the sale of that stock really had no significance. Petitioner never indicated in his ninety-day letter, before the Tax Court or before either of the appellate courts that the retention of such a veto power was deemed by him to be significant. If, however, this Court thinks

it might be of some significance, respondent requests that the case be returned to the Tax Court to take additional evidence as to just how important such veto-power was under the circumstances. *Cf. United States* v. *Wyoming*, 331 U. S. 440, *supra*; *Hormel* v. *Helvering*, 312 U. S. 552, *supra*. Respondent is prepared to show that the amount of stock which the trust owned was never as great as one and one quarter per cent. of the outstanding stock of the company; that the decedent never owned any stock of the company except the stock which he placed in the trust; that the settlor was never an officer or director of Church & Dwight Co.; that he never concerned himself with the condition of the business of that company; and that he never executed a proxy to vote stock in that company. Some indication of the extent of the decedent's concern with company affairs may be gleaned from what is already in the record. When the company declared a stock dividend, it apparently forgot that he was a trustee and issued the new certificate only in the names of his two brothers as trustees (p. 15, typewritten transcript of record).

The second power retained exclusively by the settlor was to withhold approval of reinvestments which his co-trustees proposed to make (R. 5). But if he did this his co-trustees were nevertheless authorized to invest in "legals" without his consent (R. 5).

The only other power retained by the settlor was to designate a successor trustee if he or either of his brothers ceased to be a trustee (R. 6). He had no power to remove a trustee.

Under subdivision (6) of the trust instrument (R. 6) the trustees jointly had power to determine whether receipts, losses or administration expenses were allocable to income or principal "as the trustees may deem proper". Such clauses were frequently inserted to relieve trustees of the necessity of peti-

tioning for instructions in doubtful situations.* See Note, *Discretionary Income and Principal Clauses in Trust Instruments*, 50 Yale L. J. 1467 (1941). The language of subdivision (6) was without significance insofar as the settlor was concerned since he could not exercise it without the consent of his two brothers whose own interests were adverse to an invasion of principal. Furthermore under the rule in New York such discretionary power is not construed as a power to invade principal. *Matter of Talbot*, 170 Misc. 138, 143-144 (Surr. Ct., Orange County, 1939).

The unimportance of the powers retained by the settlor may be judged by his complete indifference to retaining any administrative powers at all. When the trust instrument was being drawn it was the attorney who suggested that Mr. Church should be one of the trustees and the settlor "had no suggestions to make, suggestions** as to the form of anything" (p. 34, typewritten transcript of record).

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*, the settlor reserved much broader powers. The trustee was required to follow his instructions in regard to the management, sale or investment of any part of the trust estate, to give the settlor proxies to vote the stock in the trust and to follow the settlor's written instructions with respect to any real estate in the trust. The settlor also had power, with the consent of

*For example, when the Church trust was created in 1924, the New York rule for allocating stock dividends between principal and income "had resulted in so many complications and obscurities as to be almost unworkable in practice. . . . It involved elaborate accounting for the purpose of determining how far the dividends were the result of profits accumulated before the creation of the trust, and how far the result of profits accumulated thereafter." *People* ex rel *Clark* v. *Gilchrist*, 243 N. Y. 173, 182 (1926). By c. 843 N. Y. Laws 1926, §17-a of the New York Personal Property Law was amended to clarify the situation.

**"just" in the original is obviously a stenographic error.

one of the beneficiaries, to alter, change or modify the terms of the trust. Mr. Church had no such broad powers. The settlor in the *Reinecke* case did have the right to appoint a successor trustee in the event of a vacancy, a power analogous to that reserved by Mr. Church. All the foregoing powers reserved to the settlor in the *Reinecke* case were urged by the petitioner as evidencing that the settlor there had for his lifetime retained complete dominion over the property. This Court rejected the contention, saying (pp. 346-347):

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax."

Unless a trust is necessarily one intended to take effect in possession or enjoyment at or after death if the settlor designates himself as a co-trustee, the administrative control here reserved should not result in the taxability of the corpus. Congress has never evidenced any intent to go that far.

POINT 4.

THE TRANSFER IN QUESTION IS NOT SO MUCH "AKIN TO TESTAMENTARY DISPOSITIONS" AS TO MAKE IT SUBJECT TO THE ESTATE TAX STATUTES.

Question 8 assumes that when the trust was created "possession or enjoyment" of the trust properties passed to the beneficiaries because of certain "refined technicalities of the law of property" and, on that assumption, inquires whether transfers of that type would not be so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes.

When this Court used the term "refined technicalities of the law of property" in its *Hallock* decision it was referring to the *Klein* case. And there was ample justification for the use of the term there inasmuch as the *St. Louis Union Trust* decisions, unlike *Klein*, had seemed to turn on the fact that others had the vested remainders in the corpus while the decedent had only contingent interests. Respondent does not believe, however, that the technicalities of the law of property influenced the decisions in *Nichols* v. *Coolidge*, *Reinecke* v. *Northern Trust Co.*, *May* v. *Heiner*, *Burnet* v. *Northern Trust Co.*, *Morsman* v. *Burnet* or *McCormick* v. *Burnet*. The determinative factor there was that Congress had said it was adopting an estate tax law, not an inheritance tax law. From that the Court reasoned that Congress did not intend to tax property transferred by a decedent during his lifetime unless such property had been given in contemplation of death. The determinative factor in *Hassett* v. *Welch* was that when Congress set out to change the law it said the change was intended to be prospective only.

Disregarding therefore any technical argument that possession and enjoyment passed when the trust was created; was the instant trust akin to a testamentary disposition?

If the retained life estate be the significant feature of the disposition, there is a similarity in that enjoyment by the donee was deferred until the death of the donor. There is a marked dissimilarity in that the donor had nothing left to give when he died.

If by question 8 this Court is referring to the fact that the settlor made himself a co-trustee, it is submitted that the term "akin" is clearly inappropriate. By creating the trust the decedent surrendered his dominion over the property to trustees a majority of whom had interests adverse to his own. Under a testamentary disposition he would have reserved complete dominion until his death.

If by "akin to testamentary dispositions" this Court is referring neither to the reserved life estate nor to the co-trusteeship, but rather to the assumed existence of a remote possibility of reverter, the answer is that an extremely remote possibility of reverter bears no resemblance to a testamentary disposition under which the decedent has kept everything to the date of his death.

POINT 5.

THE RULINGS OF *HELVERING* v. *CLIFFORD* HAVE NO EFFECT UPON THIS TRUST.

In *Helvering* v. *Clifford*, 309 U. S. 331 (1940) the settlor established a trust to last for five years unless he or his wife died sooner. On its termination the corpus reverted to the settlor. The net income during the period of the trust was to be paid to the wife or accumulated, as the settlor might see fit, but when

the trust terminated she was to get any income which had been accumulated. The settlor was the sole trustee. He was authorized to vote the stocks constituting the corpus of the trust. He had unrestricted power to sell, exchange, mortgage or pledge the securities and to reinvest. He could hold the trust property in his own name if he saw fit. The wife had substantial income of her own from other sources and was presumably not in need of what he might elect to give her from the trust income, although he did in fact give her all the income.

In requiring the husband to pay tax on the income of the trust, this Court said (p. 335-337):

> "In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. Rather, the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of §22(a).
>
> "So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. * * * It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights

> he retained, the aggregate may be said to be a fair equivalent of what he previously had. * * * Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of §22(a). To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements."

Assuming that the tests which the Court applied in the *Clifford* case are appropriate to determine whether a trust shall be subjected to the estate tax,* there is little similarity between the two trusts. The *Clifford* trust was of "short duration". The Church trust was for life. In the *Clifford* trust the settlor retained almost unrestricted control over the corpus. In the Church trust the settlor surrendered the control over the corpus to trustees of whom a majority had interests adverse to his own. In the *Clifford* case the corpus belonged to the settlor. In the Church trust it would never belong to him. The *Clifford* trust involved merely a temporary reallocation of income while the Church trust involved, as its divestment feature, the permanent alienation of corpus. After he set up the trust, Mr. Church, unlike Mr. Clifford, could no longer deal with the property as he pleased. He had lost substantially all of the *indicia* and benefits of property ownership with respect to the corpus. It can scarcely be said, as in the *Clifford* case, that the benefits flowing to the settlor indirectly left an

*A point as to which even petitioner expresses considerable doubt (Pet's Br. p. 52).

aggregate which was "a fair equivalent of what he previously had." The facts here are the antithesis of the facts in the *Clifford* case.*

In the instant case the Tax Court's findings are the converse of its findings in the *Clifford* case. It has said that the settlor disposed of his interest in the corpus as well as any man could (R. 10).

POINT 6.

THE CIRCUIT COURT OF APPEALS SHOULD NOT BE REVERSED ON GROUNDS WHICH PETITIONER NEVER PRESENTED FOR ITS CONSIDERATION.

This Court has said that an appellant may not raise a point of law here which he failed to press before the lower court: *Helvering v. Cement Investors*, 316 U. S. 527, 535 (1942); *Helvering v. Wood*, 309 U. S. 344, 349 (1940); *Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937).

With the exception of the point raised by question 2, petitioner has not urged before either of the lower courts any of the points of law that are inherent in the questions propounded by this Court. At the trial, petitioner's counsel told the Tax Court:

> "Our position in brief is, that there is a possibility of reverter in this trust and that it falls within the rule of

*Even for income tax purposes the courts have consistently held the *Clifford* rulings inapplicable to trusts of the same general plan and scope as the Church trust (excepting, of course, Church's retention of the life interest) in spite of the settlor's reservation of much broader powers of administration and control than were here reserved by Mr. Church. *Kohnstamm* v. *Pedrick*, 153 F. 2d 506 (C. C. A. 2d, 1945); *Cushman* v. *Commissioner*, 153 F. 2d 510 (C. C. A. 2d, 1946); *Jones* v. *Norris*, 122 F. 2d 6 (C. C. A. 10th, 1941); *David L. Loew*, 5 T. C. 363 (1946); *Ernst Huber*, 6 T. C. 219 (1946); *Ronald K. Evans*, 5 T. C. M. 84 (1946).

Helvering vs. Hallock. [p. 4, typewritten transcript of record]

* * *

"In other words, there is no provision in the trust instrument specifically stating in the failure of issue, it shall come back to me, nor is there any provision stating that if there is no issue surviving me, it shall go to a charity or anything like that. It just provides a life estate and then for certain designated beneficiaries and then the trust instrument is silent. [*id.* p. 6]

* * *

"I know it has been contended by the petitioner that the doctrine of the Hallock case only applies where there is some express reservation in the trust instrument which says it shall revert back to the estate of the deceased.

"However, the Government's position is this and I think a certain line of cases is, that where there is no provision even in the trust instrument, that it shall specifically revert back to the estate of the deceased, why, under the rule of the Hallock case, it is includible in his estate." [*id.* pp. 6-7]

In his brief in the Tax Court, petitioner devoted less than three pages to a discussion of the law. The gist of his argument was set forth in the first paragraph of that discussion (pp. 4-5):

"There was no intent on the part of the decedent to divest himself of the ownership of the corpus. His one desire was to have an assured income and to satisfy his half-brother and keep the stock in the family. This his attorney endeavored to do by directing that the corpus go, in the event of decedent's death, to his children and their issue, if any, and in the alternative, to his brothers and sisters and their issue, if any. No provision required that the corpus should go to whoever

> might be entitled to inherit by law, but *designated in effect a class to receive the property*. Failure of the class would automatically require the return of the corpus to his estate." (Italics in original)

The petitioner then argued that *Helvering* v. *Hallock* was controlling and quoted from the language of the Court at page 112 of that decision. He then concluded (p. 6):

> "It is apparent that the transfers were incomplete in decedent's lifetime because full and complete dominion over the corpus of the trust was suspended by the contingencies of the remaindermen surviving the decedent."

Not a word about anything but the supposed possibility of reverter.

In the statement of points to be relied upon, which petitioner filed with the Circuit Court of Appeals pursuant to rule 75(d), there is no particularization as to anything but the possibility of reverter. In addition to objecting generally to the result reached by the Tax Court, the particularization reads as follows:

> "3. In failing to hold and decide that the interest of the beneficiaries designated in the trust instrument was contingent upon their survivorship of the decedent, and that the beneficiaries' interest in the said trust did not finally vest until at or after decedent's death.
>
> "4. In failing to hold and decide that decedent had a contingent remainder in the assets of said trust by operation of law and that he retained this reversionary interest until the date of his death."

In petitioner's briefs before the Circuit Court of Appeals there is no mention of *May* v. *Heiner* or of *Hassett* v. *Welch*, no hint that anything but the asserted reverter is involved. *Helvering* v. *Hallock* is mentioned, but only in conjunction

with such cases as *Fidelity Co.* v. *Rothensies*, 324 U. S. 108 (1945); *Commissioner* v. *Estate of Field*, 324 U. S. 113 (1945) and *Goldstone* v. *United States*, 325 U. S. 687 (1945). Those cases all dealt with the possibility that the donor might get the property back.

When respondent's counsel suggested at the oral argument before the court below that petitioner might be attacking *May* v. *Heiner* and *Hassett* v. *Welch* in a circuitous fashion, petitioner's counsel disclaimed any such intention. His disclaimer is the more convincing since he did not attack those cases in brief or on argument before this Court at October Term, 1947.

Petitioner's failure to raise the points is understandable. Even though he was prepared to invoke *Hallock* as authority for taxing the corpus if a fantastically remote possibility of reverter existed, he presumably did not feel that the rationale of that decision led to the repudiation of *May* v. *Heiner* and *Hassett* v. *Welch*. But if the rule against raising new points on appeal is to be disregarded in such circumstances, there is nothing left of it.

POINT 7.

THE CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED INASMUCH AS THE TAX COURT MADE NO CLEAR-CUT MISTAKE OF LAW.

The *Dobson* doctrine was abolished as a rule of law as of September 1, 1948, by section 36 of the Act of June 25, 1948, Pub. L. No. 773, 80th Cong., 2d Sess. However, *Dobson* was the law when the Circuit Court of Appeals spoke.

In respondent's earlier brief it pointed out that the Tax Court made no clear-cut mistake of law when it found that the decedent had disposed of his interest in the corpus of the trust as well as any man could and that if a reverter existed

it was so remote as not to result in taxability. The applicability of *Dobson* to that feature of the case will not be elaborated here.

But the *Dobson* rule is just as applicable to the problems raised by the last seven of the questions posed by this Court. None could say with assurance in March, 1947, that *May* v. *Heiner* and *Hassett* v. *Welch* were no longer the law. Those courts which had occasion to consider the question felt that *Hallock* had not shaken the authority of those cases. *Commissioner* v. *Singer's Estate*, 161 F. 2d 15, 17, *supra*; *Commissioner* v. *Kellogg*, 119 F. 2d 54, 56, *supra*; *Schultz* v. *United States*, 140 F. 2d 945, 948, *supra*; *United States* v. *Brown*, 134 F. 2d 372, 373, *supra*; *New York Trust Co.* v. *United States*, 51 F. Supp. 733, 735-736, *supra*; *Estate of James H. Matthews*, 3 T. C. 525, 539, *supra*. And if the rationale of the *Clifford* case would, in this Court's opinion, result in including the Church trust in the decedent's gross estate, that result is so unforeseen that even now petitioner urges it with some hesitance (Brief pp. 52-54).

Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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New York, N. Y.
October 4, 1948.

APPENDIX A

The following is a compendium of the subsections of the federal estate tax laws relating to transfers intended to take effect in possession or enjoyment at or after death, from the first modern federal estate tax law in 1916 to the law in effect on the date of decedent's death in 1939.

To facilitate tracing the changes in the subsection, italics indicate new language not to be found in the subsection immediately prior to the respective enactments, and lines through the text indicate language omitted from the respective enactments which was in the subsection as it read immediately theretofore.

Revenue Act of 1916—39 Stat. 777—September 8, 1916.

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Revenue Act of 1917—39 Stat. 1000—March 3, 1917.

The Revenue Act of 1917 was amendatory only. No amendments to section 202(b) of the Revenue Act of 1916 were made.

Revenue Act of 1918—40 Stat. 1097—February 24, 1919.

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this Act*), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Revenue Act of 1921—42 Stat. 278—November 23, 1921.

The Revenue Act of 1921 reenacted section 402(c) of the Revenue Act of 1918 without change.

Revenue Act of 1924—43 Stat. 304—June 2, 1924.

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of

or intended to take effect in possession or enjoyment at or after his death ~~whether such transfer or trust is made or created before or after the passage of this Act~~, except in case of a bona fide sale for a fair consideration in money or moneys worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of *Part I of* this title;

Revenue Act of 1926—44 Stat. 70—February 26, 1926.

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, *by trust or otherwise,* ~~or with respect to which he has at any time created a trust,~~ in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for ~~a fair~~ *and adequate and full* consideration in money or money's worth. *Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title.* Any transfer of a material part of his property in the nature of a final

disposition or distribution thereof, made by the decedent within two years prior to his death *but prior to the enactment of this Act*, without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning ~~of Part I~~ of this title.

Revenue Act of 1928—45 Stat. 791—May 29, 1928.

The Revenue Act of 1928 was amendatory only. No amendments to section 302 (c) of the Revenue Act of 1926 were made.

Public Resolution No. 131—46 Stat. 1516—March 3, 1931.

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or

interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Revenue Act of 1932—47 Stat. 279—June 6, 1932.

SEC. ~~302~~ 803. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, ~~including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;~~ *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom,* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. ~~Where within~~

~~two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title.~~ Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death ~~but prior to the enactment of this Act~~ without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

Internal Revenue Code—53 Stat. 1—February 10, 1939.

There were no subsequent amendments to or reenactments of section 302(c) until the enactment of the Internal Revenue Code on February 10, 1939. Section 302(c) was reenacted as section 811(c) of the Code (53 Stat. 120) with insignificant changes including new catch-lines to accord with the general form of the Code. Section 811(c) reads as follows:

Sec. 811. *GROSS ESTATE.*

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, *except real property situated outside of the United States—*

* * *

(c) *TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.*—To the extent of any in-

terest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for h life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this ~~title~~ *subchapter*;—

Code section 811(c) has never been amended. The decedent died on December 10, 1939, ten months after enactment of the Code.

APPENDIX B

The following is a compendium of the subsections of the United States Treasury Regulations relating to the estate tax in so far as applicable to *inter vivos* transfers subject to a reservation of income for life by the transferor, from the first regulation promulgated on this subject in 1919 to the regulation in effect on the date of decedent's death in 1939.

The first estate tax regulations were published in 1916 (U. S. Treas. Reg. 37). They contained no provision that a transfer *inter vivos* subject to a reservation of income for life by the transferor was a transfer intended to take effect in possession or enjoyment at or after his death. Nor did the 1917 revision of Regulation 37 contain any such provision. It appeared for the first time in the 1919 revision of Regulation 37.

To facilitate tracing the changes in the subsection italics indicate new language not to be found in the subsection immediately prior to the respective promulgations. Changes brought about by treasury decisions are indicated by brackets enclosing the affected part except where the change was so substantial as to warrant the reproduction of the amended subsection in its entirety. The text of the subsections pertaining to annuities has been omitted. Attention is also called to the fact that Regulations 63, 68 and 70 were, for a time, in effect concurrently as they were intended to apply respectively to the 1921, 1924 and 1926 Acts.

U. S. Treas. Reg. 37 (Revised 1919).

"Art. 24. RESERVATION OF INCOME.—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross

estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. * * * A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decent's life is payable to some one other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable."

There was also a 1921 edition of Regulations 37 in which the passage quoted above remained unchanged.

U. S. Treas. Reg. 63 (1922).

[Matter in brackets was deleted on March 15, 1930, by T. D. 4283, IX-1 Cum. Bull. 366 (1930).]

"Art. 20. RESERVATION OF INCOME.—A transfer, *not amounting to a bona fide sale for a fair consideration in money or money's worth*, is taxable where the *decedent* reserved to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment *at* the death of the *decedent*, and the value of the entire property should be included in the gross estate. Where the *decedent* reserved a proportionate part of the income, only a corresponding proportion of the value of the property should be included in the gross estate. If, for example, he reserved one-half of the income, the value of one-half of the property transferred should be included in the gross estate. * * *

["A gift of the principal *intended to take* effect *either in possession or enjoyment* at or after the decedent's death is taxable, although the income during the decedent's life *was* payable to some one other than himself. Example: The decedent transferred property to his son, the latter agreeing to pay

the income to his mother during the decedent's life. The transfer to the son is taxable."]

U. S. Treas. Reg. 68 (1924).

[Matter in brackets was deleted on March 15, 1930, by T. D. 4284, IX-1 Cum. Bull. 358 (1930).]

"Reg. 68, Art. 18. RESERVATION OF INCOME OR AN ANNUITY.—A transfer, not amounting to a bona fide sale for a fair consideration in money or moneys worth, is taxable where the decedent reserved to himself during life the *entire* income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

"Where the decedent reserved *only a portion* of the income, only a corresponding proportion of the value of the property should be included in the gross estate, [*unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be.*] Thus, for example, if *the reservation was of* one-half of the income *then* one-half of the value of the transferred property should be included, *and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.*

* * *

"Where *in any case* the transfer was made in contemplation of death, the full value of the transferred property, as of the date of the decedent's death, should be included in the gross estate *whether or not the transfer was one intended to take effect in possession or enjoyment at or after death.*

"[*Where there was no reservation of income . . . but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus* a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable although the income . . . was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable."]

U. S. Treas. Reg. 70 (1926).

Reg. 70, Art. 18. RESERVATION OF INCOME OR AN ANNUITY.—A transfer, not amounting to a bona fide sale for *an adequate and full* consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

"Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property should be included in the gross estate, unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be. Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the prop-

erty should be postponed until at or after his death, then the value of the entire property should be included.

* * *

"Where in any case the transfer was made in contemplation of death, the value of the transferred property, as of the date of the decedent's death, should be included in the gross estate whether or not the transfer was one intended to take effect in possession or enjoyment at or after death. (See Art. 16)

"Where there was no reservation of income . . . but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income . . . was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter *to receive the income during the decedent's life*, or agreeing to pay the income to his mother during the decedent's life. The transfer to the son *in either case* is taxable."

U. S. Treas. Reg. 70 (Revised 1929).

[Matter in brackets deleted on March 15, 1930, by T. D. 4285, IX-1 Cum. Bull. 356 (1930).]

"Reg. 70, Art. 18. Reservation of income or an annuity.—A transfer, not amounting to a bona fide sale for an adequate and full consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

"Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property

should be included in the gross estate, [unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be.] Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, [and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.]

* * *

"Where in any case the transfer was made in contemplation of death, the value of the transferred property, as of the date of the decedent's death, should be included in the gross estate whether or not the transfer was one intended to take effect in possession or enjoyment at or after death. (See Art. 16)

["Where there was no reservation of income . . . but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable although the income . . . was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable."]

Appendix B

U. S. Treas. Reg. 70 (Revised 1929), as amended by T. D. 4285, *supra*, as further amended on April 11, 1932, by T. D. 4386, XI-1 Cum. Bull. 329.

"Art. 18. *Retention of possession, enjoyment, or income.*—*Any transfer which was made by the decedent after 10.30 p.m., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.*

"Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the *decedent retained* one-half of the income, then one-half of the transferred property should be included."

U. S. Treas. Reg. 80 (1934).

"Art. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—*The statutory phrase, 'a transfer . . . intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life.* (See article 15.)

"(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p.m., eastern standard time, March 3, 1931, *and (2) if the decedent died prior to* 5 p.m., *eastern standard time, June 6, 1932. (See section 506 of the Revenue Act of 1934.)"*

U. S. Treas. Reg. 80 (1934), as amended March 18, 1937, by T. D. 4729, 1937-1 Cum. Bull. 284, 285.

"Art. 18. Transfers with possession or enjoyment retained.—(a) Transfers included.—The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation *or retention* by the decedent of the use, or the possession, or the rents or other income *or enjoyment* of the transferred property, or any part thereof, for his life, or for a period *not* ascertainable without reference to his death, or for *such* a period as to evidence his intention *that it should extend at least for the duration of his life; including also the reservation or retention of the use, possession, rents, or other income the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate.* (See article 15.)

"If for any such period the use, possession, rents or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents or other income will be treated as having been reserved to or retained by the decedent.

"(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p.m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p.m., eastern standard time, June 6, 1932. (See section 506 of the Revenue Act of 1934.)"

U. S. Treas. Reg. 80 (Revised 1937).

No change was made in the portion of Article 18 quoted above by the 1937 Revision of Regulations 80.

U. S. Treas. Reg. 80 (Revised 1937), as amended on October 24, 1938, by T. D. 4868, 1938-2 Cum. Bull. 355.

ART. 18. Transfers with possession or enjoyment retained.—*Except in the case of* a bona fide sale for an adequate and full consideration in money or money's worth, *the gross estate embraces (section 302(c), as amended) all property transferred by the decedent,* whether in trust or otherwise, *if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—*

"*(1) At any time after* 10.30 p.m., eastern standard time, March 3, 1931, *and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or*

"(2) *At any time after* 5 p.m., eastern standard time, June 6, 1932, *and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.*

Appendix B

A reservation for a 'period not ascertainable without reference to his death' may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

"The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

"If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

"(See article 15.)"

Article 18, U. S. Treas. Reg. 80 (Revised 1937), as set forth above was in effect when the decedent died on December 10, 1939. It is in effect today as section 81.18 of Regulations 105.

U. S. Treas. Reg. 105 (1942).

Although not promulgated until 1942, Regulations 105 were made applicable to the estates of decedents dying after February 10, 1939, the date of the enactment of the Internal Revenue Code. No change was made in Art. 18, U. S. Treas. Reg. 80 (revised 1937) except that it was redesignated as section 81.18 and statutory references were conformed with the new Code sections. The regulation remains unchanged today.

FILE COPY

SEP 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 5.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLOCK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* ON *STARE DECISIS* AND MAY *v.* HEINER

HUGH SATTERLEE,
ROLLIN BROWNE,
THORPE NESBIT,
Amici Curiae.

Ballantine Press Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

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OCTOBER TERM, 1948

No. 5

COMMISSIONER OF INTERNAL REVENUE,
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v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLOCK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* ON *STARE DECISIS* AND MAY *v.* HEINER

This brief, by permission of the Court and with the written consent of counsel for both parties, is filed by the undersigned as *amici curiae* on behalf of the Estate of George W. B. Roberts, deceased, against which an estate tax liability has been asserted on account of an alleged reverter interest "by operation of law" in an *inter vivos* transfer made by the decedent prior to March 3, 1931, in which he reserved a life estate.

Our argument will be directed to questions numbered 3, 4, 5 and 7 on which the Court requested reargument in its order of June 21, 1948. Those are the questions relating to the reservation of a life estate by the decedent and the continued authority of the Court's holdings in *May* v. *Heiner*, 281 U. S. 238, and *Hassett* v. *Welch*, 303 U. S. 303, in view of the later decision in *Helvering* v. *Hallock*, 309 U. S. 106.

SUMMARY OF ARGUMENT

The Court has asked whether it should adhere to the rule of *May* v. *Heiner*, a rule first adopted by unanimous decision of the Court in 1930, after previously having been forecast by other respectable authority; reaffirmed unanimously in 1931 after most mature reconsideration by *per curiam* decisions in three additional cases; accepted and followed, by necessary implication, in 1935, in still another unanimous decision of the Court; admittedly brought to the specific attention of Congress and expressly declared on the floor of Congress to be accepted as to past transactions, although being at the same time altered as to the future; accepted and followed in a long line of Treasury decisions; relied on by individuals in making dispositions of their property or in retaining in dispositions already made interests which this Court and the Treasury had assured them repeatedly they might retain without tax consequences; a rule resting on a reasonable and logical basis, and not in conflict with anything theretofore or thereafter decided by this Court.

It is now too late to overturn a rule thus adopted, reaffirmed, accepted and relied on for eighteen years.

ARGUMENT.

If the rule of *Stare Decisis* has any remaining vitality, it requires reaffirmance of May *v.* Heiner.

We base our argument on Mr. Justice Frankfurter's statement of the guiding principles to be followed in applying the rule of stare decisis, as set forth in his opinion in the *Hallock* case, 309 U. S. at pp. 119-121, which, for the convenience of the Court, we quote at some length:

> "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the *latest decision, however recent and questionable*, when such adherence involves *collision with a prior doctrine* more embracing in its scope, intrinsically sounder, and verified by experience.
>
> "Nor have we in the St. Louis Union Trust Co. Cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. * * * *We have not before us interests created or maintained in reliance on those cases.* * * *
>
> "Nor does want of specific congressional repudiations of the St. Louis Union Trust Co. Cases serve as an *implied* instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the Klein case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping congressional *silence* to debar this Court from re-examining its own doctrines. To explain the cause of *non-action* by Congress *when Congress itself sheds no light* is to

venture into speculative unreality. *Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the St. Louis Union Trust Co. Cases it had,* even by any bill that found its way into a committee pigeonhole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such *inaction* by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reexamination by this Court *of distinctions* which it had drawn. Various considerations of parliamentary tactics and strategy might be suggested as reasons for *the inaction of the Treasury and of Congress,* but they would only be sufficient to indicate that we walk on quicksand when we try to find *in the absence of corrective* legislation a controlling legal principle.

"* * * Whatever else may be said about *want of congressional action* to modify by legislation the result in the St. Louis Union Trust Co. Cases, it will hardly be urged that the reason was congressional approval *of those distinctions* between the St. Louis Union Trust Co. and the Klein Cases *to which four members of this Court could not give assent.* By imputing to Congress *a hypothetical recognition* of coherence between the Klein and the St. Louis Union Trust Co. Cases, we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity *of distinctions* which this Court has itself created. *'Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications.'* (Emphasis supplied.)

Almost every line of that statement by negative inference requires that this Court now adhere to its former decision in *May* v. *Heiner.*

The Court is *not* here confronted, as it was in the *Hallock* case, with merely a recent divergence by a bare majority of the Court from an unquestioned rule previously laid down by unanimous decision of the Court.

We do *not* have here, as in the *Hallock* case, a mere implied acceptance of the prior rule by Congress, possibly due to the rule not having been called to its attention, or mere inaction by the Treasury claimed to constitute acquiescence in the rule.

The Court *is* here confronted with a situation in which without question interests were created or maintained in reliance on the rule now brought into question.[1]

We shall not attempt to re-examine minutely, or give a new all-inclusive definition of, the phrase, "take effect in possession or enjoyment", contained in Section 302(c) of the estate tax law. Suffice it to say that almost from the beginning it was recognized that the phrase contained a possible ambiguity. In 1922, in *Levy* v. *Wardell*, 258 U. S. 542, this Court, considering certain transfers in which the transferor had reserved a life interest, said that they were "not in contemplation of, or intended to take effect in possession or enjoyment at or after her death" and that "all of the transfers were intended to take effect in possession and enjoyment upon their date". But the opinions of Judge Hough and Judge Learned Hand in *Frew* v. *Bowers*, 12 F. (2d) 625, decided in 1926, show there were conflicting views as to the proper interpretation of the phrase.

Judge Hough pointed out that it was the natural inclination of every lawyer to recognize that the words "take ef-

[1] For cases involving similar transfers made after the decision in *May* v. *Heiner* but before the adoption of the joint resolution of March 3, 1931, see *Brewer* v. *Hassett*, 49 Fed. Supp. 501; *Smith* v. *United States*, 16 Fed. Supp. 397; *Estate of Rosenwasser* v. *Commissioner*, 5 T. C. 1043.

fect'' were not a phrase of art, and to search for some ''artistic equivalent'' and to find it in the word ''vest''. According to that school of thought, if a transfer immediately vests out of the transferor, ''the transaction is complete, and the grantor or transferor has no 'interest' left therein''.

On the other hand, Judge Hough said, there were those who ''look only to what Congress is supposed to have wanted, i. e., to collect the largest quantum of tax and so read 'possession' and particularly 'enjoyment' as meaning the time when remaindermen and/or reversioners will obtain the usufruct of the property''.

Judge Hough said that the decisions up until then were hopelessly at variance, but he concluded that ''the ruling decisions seem to us to go no further than to definitely hold that a trust creation, wherein the possession or enjoyment in the usufruct sense is deferred until 'at or after' the death of the settlor, is a 'completed' transaction, a holding consistent only with the more technical and legal interpretation of the statutory words''.

Accordingly, it was held that the settlor had no taxable interest in the property at the time of his death, in spite of the fact that he had retained ''a life interest in the net income'', which was considered ''not relevant to this tax''.

Judge Hand, writing a special concurring opinion, said that '' 'possession or enjoyment' appears to be a phrase clearly intended to refer to the period when the remainders 'fall in', not to that at which they 'vest' '', but he concurred on the ground that the statute was unconstitutional as applied to this particular transfer, which was made long prior to its enactment, thus conceding that the transfer was complete when made, despite the reservation of the life estate.

It sometimes has been asserted that the decisions holding that the phrase ''take effect in possession or enjoyment''

referred to the indefeasible vesting of remainders rather than to their falling in simply had overlooked or without reason disregarded a great body of state court decisions interpreting to the contrary similar language contained in various state tax laws of long standing. Judge Hand's opinion in *Frew* v. *Bowers* shows that such was not the case. Judge Hand referred to the state decisions, but he also referred to the distinction between a tax on the right to inherit or succeed to property interests and a tax on the right to transfer or transmit by death. The state statutes, being generally of the former class, might with reason be interpreted as applying to the falling in of a future interest, while at the same time the Federal statute, being of the latter class, might with equal propriety be interpreted as applying only to the indefeasible vesting of the interest out of the decedent.[2]

Thus, when *May* v. *Heiner* came before this Court in 1930, it was well understood that the key statutory phrase on which the case must turn was susceptible to two interpretations; that the weight of state authority, in applying state death taxes, had interpreted the phrase to refer to the "falling in" or the beginning of the "usufruct" of the remainder interests, but that that interpretation was not necessarily applicable to the Federal estate tax law, for the purposes of which the phrase was at least equally susceptible to being interpreted as referring to indefeasible vesting out of the decedent, as it had in fact already been interpreted in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

[2] The New York tax of those days was a "transfer" tax, but it was imposed separately on the interest passing to each transferee and the tax on remainders generally was postponed until they fell in. It is significant that some of the New York decisions made it clear that a transfer of a remainder subject to a reserved life estate, although taxable when it fell in, was nonetheless complete when the instrument of transfer was executed. See, for example, *Matter of Webber*, 151 App. Div. 539.

The question was fully and ably argued and after due deliberation this Court unanimously held with the latter view.

It is true that the decision came as a surprise to a segment of the bar, which perhaps merely had assumed without investigation or study that the phrase must have the same meaning under the Federal law as had been ascribed to it under various state statutes. In any event, the decision was not universally accepted. The government brought the question again before this Court in three cases decided by *per curiam* decisions on March 2, 1931. (*Burnet* v. *Northern Trust Company* and *Morsman* v. *Burnet*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 783.) Again the matter was fully argued, and the state court decisions were relied on strongly by the government. Again the decision of the Court, adhering to its former ruling, was unanimous.

In 1935, the question again came before this Court, in *Helvering* v. *Helmholz*, 296 U. S. 93. In that case the decedent had transferred property in trust in 1918 (two years after the enactment of Sec. 302(c)), reserving the income for life and a power, together with all other beneficiaries, to terminate the trust. It was contended that the transfer was taxable under Section 302(d) of the estate tax law (first enacted in 1924) as a transfer over which the decedent had reserved a power to alter, amend or revoke. This Court unanimously held that the transfer was not taxable, basing its decision on two grounds: (1) that a power in all the beneficiaries of a trust to terminate the trust was not a power to "alter, amend or revoke", and (2) that if the statute could be construed as attempting to tax the transfer, it would be unconstitutional since "the transfer was complete at the time of the creation of the trust" and "there remained no interest in the grantor".

Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo concurred in the decision only on the constitutional ground, which by necessary implication was a holding that the reservation of the income for life did not leave the transfer incomplete.

In *Hassett* v. *Welch*, 303 U. S. 303, apparently it was not contended by the government that the transfers were taxable without regard to the joint resolution of March 3, 1931 or the Revenue Act of 1932, but, in any event, the Court in deciding unanimously that neither of those enactments rendered the transfers taxable said nothing to indicate that their former decisions had lost any of their vitality.

Every one of the eleven Justices[3] who participated in any of the foregoing decisions agreed with the result, and with the opinions expressing that result.

The rulings of this Court were called specifically to the attention of Congress, which consciously and deliberately accepted them as to past transactions, while modifying them as to the future.

The congressional history surrounding the adoption of the joint resolution of March 3, 1931 and the amendment of Section 302(c) of the estate tax law by the Revenue Act of 1932 was traced fully in the respondent's brief filed in this Court by Hon. William D. Mitchell in *Helvering* v. *Marshall*.[4] There it was shown that the joint resolution was introduced and adopted, on unanimous agreement to suspend the rules, specifically because of this Court's *per*

[3] Chief Justices Hughes and Stone and Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts, Black and Cardozo.

[4] Decided with *Hassett* v. *Welch*.

curiam decisions of the previous day reaffirming *May* v. *Heiner*. Congressional Record, Volume 74, Part 7, 71st Congress, Third Session, pp. 7076-9; 7198-9. It also was pointed out, and in this Court's decision it was held, that Congress deliberately and consciously decided to make both the joint resolution and the 1932 amendment operate prospectively only.

In this connection it is important to remember that in its three *per curiam* decisions the Court apparently had warned that any attempt to reform the statute retroactively would at least be open to constitutional doubts. In each one of the decisions, the Court in reaffirming the rule of *May* v. *Heiner* went out of its way to add: "there being no question of the constitutional authority of the Congress to impose *prospectively* a tax with respect to transfers or trusts of the sort here involved". (Emphasis supplied.)

Although Mr. Garner, speaking on the floor of the House in support of the joint resolution, said that the Committee on Ways and Means had not made the resolution retroactive because they were "afraid that the Senate would not agree to it", and expressed the hope "that the next Congress will make it retroactive", wiser counsels apparently prevailed and Congress never did take any action to "make it retroactive", probably partly in deference to this Court's constitutional warnings and its flat holding in 1935, in *Helvering* v. *Helmholz*, that such a transfer could not constitutionally be taxed retroactively.

It thus is clear that Congress did know of this Court's decisions and did reform the statute so as to prevent similar holdings as to future transactions but at the same time deliberately and consciously accepted the decisions as to past transactions.

It is submitted that it is entirely clear that neither the joint resolution of 1931 nor the 1932 amendment was "intended to be a repudiation of" the rule of *May* v. *Heiner* as to transfers completed before the adoption of the resolution.

The Treasury regulations have consistently and repeatedly acquiesced in this Court's decisions.

On May 22, 1931 the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued a Treasury decision to the effect that the joint resolution of March 3, 1931 should not be given retroactive application (T. D. 4314, X-1 C. B. 450).

On April 11, 1932 the Commissioner, with the approval of the Secretary, formally amended the estate tax regulations, so as to make the tax apply to any transfer made *after the adoption of the joint resolution*, under which the transferor retained a life estate (T. D. 4336, XI-1 C. B. 329).

On November 7, 1934, Estate Tax Regulations 80 were promulgated, in Article 18 of which the Treasury attempted to give retroactive application to the 1932 amendment, but not to the 1931 joint resolution. To the same effect was Article 18 of the October 26, 1937 revision of Regulations 80.

Following this Court's decision in *Hassett* v. *Welch*, and on October 24, 1938, the Commissioner, with the approval of the Secretary, amended Article 18 of Regulations 80 so as to deny any retroactive effect to the 1932 amendment, as well as to the 1931 joint resolution (T. D. 4868, 1938-2 C. B. 355).

In 1942, Regulations 80 were succeeded by Regulations 105, Section 81.18 of which also provided clearly that

neither the 1932 amendment nor the joint resolution had any retroactive application. And so the regulations of the Treasury Department have remained down until the present time.

Moreover, the question was given further intensive study by the Treasury Department when in 1946, after a full review of its regulations affecting the taxation of transfers intended to take effect in possession or enjoyment at or after death, it issued Treasury Decision 5512 (1946-1 C. B. 264) amending Section 81.17 of Regulations 105 dealing with that subject.

The amended regulation laid down the rule that a transfer should be deemed to be intended to take effect in possession or enjoyment at or after death if "(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)". The amended regulation then stated categorically that "the decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life", and the reader was directed to Section 81.18 of the regulations, referred to above, for the rules governing "the case of a life estate retained in property transferred by the decedent". Moreover, in Example (6), the amended regulation provided as follows:

> "The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the

decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate."

The foregoing regulation, which never has been revoked or modified, completes the picture. It makes it clear that, according to the Treasury's settled interpretation of the statute at all times since this Court's decision in *Hassett* v. *Welch* (and between the decision in *May* v. *Heiner* and the 1932 amendment), the mere retention of a life estate has not been deemed sufficient to subject a transfer made prior to March 3, 1931 to estate tax either as a transfer "intended to take effect in possession or enjoyment at or after death", or because of the provisions of the 1931 joint resolution or the 1932 amendment to Section 302(c).

There is nothing in *Helvering* v. *Hallock* which requires or justifies the overruling of *May* v. *Heiner* or *Hassett* v. *Welch*.

Certainly the Justices who joined in the dissenting opinion in the *St. Louis Union Trust Co.* cases,[5] subsequently overruled in the *Hallock* case, did not see any inconsistency between the rule of *May* v. *Heiner* and the *Hallock* rule, as they agreed with both. Nor did the Justices who participated in the three unanimous *per curiam* decisions of March 2, 1931, reaffirming *May* v. *Heiner*, since they also participated in the unanimous decision in *Klein* v. *United States*, 283 U. S. 231, on the authority of which the *Hallock* case was decided. It is submitted that those Justices were right.

[5] *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48.

May v. *Heiner* dealt with the reservation of the income from transferred property *during the transferor's life.* The *Hallock* case dealt with the transfer of the property interests *following the transferor's death.*

The decisions are not merely reconcilable—they are in complete harmony as to the taxation of interests in property "at or after" the transferor's death. Under each case, the test is *whether the indefeasible vesting of those interests out of the transferor is conditioned on the transferor's death.*[6]

We hesitate to refer to "vesting", lest we be accused of relying on artificial niceties of the archaic law of conveyancing. But when we couple the word with the qualifying adverb "indefeasibly", we think it cannot be doubted that we speak of real substance rather than mere form, and that we care nothing for subtle distinctions between conditions precedent and subsequent, or between reversions and mere possibilities of reverter.

For purposes of the *Hallock* rule, it is entirely immaterial whether the transferor reserved a life interest in the property transferred. The only relevant feature is the postponement until at or after the transferor's death of the determination of whether the property will return to the transferor's estate or pass to others. Whether during his life the income is paid to him or to others does not affect the question. This is made clear in the Treasury regulations (Section 81.17, Regulations 105).

That the postponement until at or after the death of the transferor of the determination of the identity of the remaindermen does not render a transfer one intended to

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[6] The same is true of the decisions following and applying the *Hallock* case, such as *Fidelity-Philadelphia Trust Company* v. *Rothensies*, 324 U. S. 108, and *Commissioner* v. *Field*, id. 113.

take effect in possession or enjoyment at or after death, so long as the possibility of the property revesting in the transferor's estate is not so postponed, was settled as long ago as 1929, in *Reinecke* v. *Northern Trust Co., supra.*

On the other hand, the rule of *May* v. *Heiner* does not mean that every transfer in which the transferor reserves a life estate is not taxable. It means only that such a transfer is not taxable if the transfer of the remainder interests following the transferor's death is not conditioned on the transferor's death through the device of postponing the indefeasible divesting of such remainder interests until at or after the transferor's death.

Concededly, the decision in the *Hallock* case necessarily implied repudiation of some of the cases which had followed *May* v. *Heiner*—cases in which not only were life interests reserved by the transferors but it also appeared that the transfers of the remainder interests were conditioned on death of the transferors. See, for example, *McCormick* v. *Burnet* and *Helvering* v. *Marshall, supra.* But cases where, although life estates were reserved, the transfers of the remainder interests were not conditioned on death of the transferors, were and should remain entirely unaffected.[7]

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[7] Not every possibility of reverter or reversionary interest, even if expressly reserved, renders a transfer taxable under Section 811(c) as a transfer intended to take effect in possession or enjoyment at or after death. For example, if the decedent made a transfer, to pay the income to A for life, with remainder to A's surviving issue, but if none, then back to the decedent, his heirs, executors, administrators and assigns, the decedent, at the time of his death, would either own the property outright (A having died without issue) or he would own the conditional right to the property if A should die thereafter without issue. Such right would pass to and become a part of the decedent's estate. Any such reversionary interest, *turning on any condition other than the transferor's death*, and being entirely unaffected by the transferor's death, is taxable, if at all, under Section 811(a), as property owned by the decedent at the time of his death, *at the date-of-death value of*

Thus the adoption of the *Hallock* rule furnished no occasion for the abandonment of the rule of *May* v. *Heiner*. Moreover, much as we always have approved and agreed with the dissenting opinions in the *St. Louis Union Trust Co.* cases and the majority opinion in the *Hallock* case, experience with the latter case has led us to wonder whether the overruling of the former was entirely fortunate or whether after all the remedy might not better have been left to Congress. It can be asserted with some confidence that Congress probably never would have adopted a rule taxing the full value of property transferred merely because of the reservation, often by accident rather than design, of a remote possibility of a future interest of no computable value. Some evidence in corroboration may be found in the provisions of Section 202 of the Revenue Revision Bill of 1948, now pending in Congress, (H. R. 6712), by which the law would be amended so as to tax only the actuarial value as of the date of death, if any, of any such future interest so reserved. In the instant case the interest had no value.

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such interest, and does not render the entire transfer taxable under Section 811(c) as a transfer intended to take effect at or after death. This distinction is fully recognized in the Treasury regulations, as amended by T. D. 5512. It is possible to have a case involving the reservation of both a life estate and a reversionary interest without thereby rendering the entire transfer taxable under Section 811(c). For example, if the decedent made a transfer in trust for the life of A, and so much longer as the decedent might live, providing that the income should be paid to the decedent during his life, and providing that on the termination of the trust the property should be paid over to certain named or described persons *if they should survive A*, otherwise to the decedent's estate, the transfer of the remainder interest following the decedent's death would not be conditioned on the decedent's death.

Conclusion.

It is now too late, in the orderly administration of justice, for this Court to overturn the rule of *May* v. *Heiner*, after both Congress and the Treasury have accepted it and taxpayers have relied on it for eighteen years.

Many transfers antedating March 3, 1931, in which the transferors reserved only life estates, have gone entirely free of estate tax. To single out now and subject to tax those estates in which the tax proceedings have not been completed would create just the kind of discrimination which the rule of *stare decisis* was designed to prevent.

Respectfully submitted,

HUGH SATTERLEE,
ROLLIN BROWNE,
THORPE NESBIT,
Amici Curiae.

September, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 5

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE OF FRANCOIS L. CHURCH, DECEASED,
EDWARD E. BLACK, THE EXECUTOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF AMICI CURIAE ON CERTAIN LIMITED POINTS.

LELAND K. NEEVES,
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Amici Curiae.

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Of Counsel.

October, 1948.

THE GUNTHORP-WARREN PRINTING COMPANY, 215 WEST JACKSON, CHICAGO

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BRIEF OF AMICI CURIAE ON CERTAIN LIMITED POINTS.

This brief, with the written consent of counsel for both parties, is filed by the undersigned as *Amici Curiae* on behalf of the Estate of William Bloss Lloyd, deceased, against which an estate tax liability has been asserted.

While the deficiency assessed against the Lloyd estate is based on the inclusion in the gross estate of several trusts, the problems presented are illustrated by the largest trust, created in 1923, in which the decedent reserved a contingent life estate (in the balance of the income after certain annuities) which would take effect if he survived his wife who was given an immediate life estate and in which

the Commissioner will contend, we believe erroneously so under Illinois law, that there was a remote possibility of reverter by operation of law. The trust was to terminate on the death of the last survivor of decedent, his wife and his former wife. His wife survived him so that the trust did not terminate on his death and the interests of the beneficiaries did not become determined at that time and decedent's reserved life estate never took effect.

These facts suggest a variation from the facts in the *Speigel* and *Church* cases which, it is respectfully submitted, the Court should consider in reaching a correct decision in the two cases presently before it and in considering the nine questions asked of counsel. A chief purpose of this brief is to call the Court's attention to the extreme danger in overruling earlier decisions like *Reinecke* v. *The Northern Trust Company* and *May* v. *Heiner* without giving the most careful consideration to the consequences of its action, and to the salient fact that if those cases are overruled it becomes a matter of great difficulty, if not impossibility, to draw a line short of taxing all long-term *inter vivos* trusts.

Our argument will be directed to some extent to all of the nine questions on which the Court requested reargument in its order of June 21, 1948, but will attempt merely to present certain views not otherwise covered by other counsel. Even within this scope, the present brief is not in any manner a complete presentation of the points touched upon, this being the result of the necessary limitations of time and self-imposed limitations as to length.

ARGUMENT.

I.

The Reinecke Decision Should Be Adhered to On Its Merits, and the Hallock Case Should Be Properly Limited.

The decision in *Reinecke* v. *The Northern Trust Company*, 278 U. S. 339, has been properly regarded as establishing the requirement for the imposition of the tax under Code Section 811(c) that the decedent must retain some economic benefit in the trust estate. While the case is not referred to by name in the nine questions, it furnishes the answer to the first, sixth, eighth, and ninth questions, so that the Solicitor General regards these questions, or some of them, as questioning the validity of the decision.[1]

The *Reinecke* case, as so interpreted, was a sensible construction of the statutory provision taxing transfers "intended to take effect in possession or enjoyment at or after * * * death."

The words "at" and "after" are used together in the statute, and a holding that a trust can be taxed merely because it terminates at death and the beneficial interests are then fixed, leads to the problem whether a trust may be taxed if it was to terminate, or would probably terminate, after death. Since the imposition of the tax in the latter situation would mean the taxing of all long-term

1—An examination of the actual facts as to the trust involved in the *Reinecke* case will show that it was not exactly one to terminate on death and the case is to this extent distinguishable from the *Spiegel* and *Church* cases where the trusts were to terminate on death. In the light of the following discussion it will be seen that this affords an additional reason for not overruling the *Reinecke* case on its facts.

trusts, it seems plain that the statute was not to be taken literally, as was contended by the Government.

The set of facts in the *Spiegel* and *Church* cases, where the trust terminated on the death of the donor, offer, from the point of view extending the application of the tax, a tempting first step beyond the requirement of the retention of economic benefit. The Court should ask itself, however, what would be done with cases where other lives measure the duration of the trust, and it does not terminate on death, and in this connection the facts as to termination in *Fidelity Company* v. *Rothensies*, 324 U. S. 108, *Commissioner* v. *Field Estate*, 324 U. S. 113, and *Goldstone* v. *United States*, 325 U. S. 687, should be considered, and should be contrasted with the statement at the top of page 25 of the Solicitor General's brief on reargument.[2]

The Commissioner's Regulations which are set out at page 64 in the Solicitor General's brief on reargument, set up two requirements for the application of the above statutory phrase, as follows:

> "(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and
>
> "(2) the decedent or his estate possesses any right or interest in the property * * *."

It must be noted that the first requirement, as stated, is not that the interests of the beneficiaries be determined on decedent's death, but the language can at least be construed, and the Commissioner has construed it in

2. On page 25 of the Solicitor General's brief it is stated: "If the death of the decedent is the event which determines not only the time when the ultimate taker will enter into actual possession or enjoyment but also determines who that taker will be, the ultimate possession or enjoyment of the property has been suspended until the decedent's death * * *". The three decisions of this Court would not appear to satisfy the requirement for the imposition of the tax as here stated.

practice, as covering cases where, although the beneficiaries must survive the decedent, they must also survive the expiration of a period, perhaps determined by the lives of others, extending beyond the death of decedent. As so interpreted and applied, it is submitted that the Regulation goes beyond the proper scope of Section 811(c) and the *Hallock* case in taxing transfers where the death of the decedent does not cut off the decedent's possibility of reverter, or cause the decedent's interest to pass to the trust beneficiaries, but instead passes decedent's reversionary interest to his estate under his will. In the *Hallock* case, on the other hand, while the trusts were not to terminate on death, the situation was essentially the same and the facts were in substance a gift to A for life, with distribution of the principal on the death of A to the settlor, if living, and if the settlor were dead, then to B. The death of the settlor was the event which shifted the entire remainder interest from the settlor to the beneficiary. The Regulations would impose a tax on the entire trust under 811(c), where only the value of the reversionary interest, which is an asset of the settlor's estate, should be taxed under 811(a) rather than 811(c). In the case of trusts which terminate on the death of the last survivor of the settlor and other persons, where the trust continues after the settlor's death and he has merely a reversionary interest to himself or his estate if the beneficiaries fail to survive the termination of the trust, his death is not the "intended event" which "gives valuable assurance" to the beneficiaries or the "generating source of their title."

The *Hallock* case further, instead of being inconsistent with the *Reinecke* case, reiterates the rule as to the necessity of the retention of substantial economic benefit. The reversionary interest there was actual and substantial, and the tax was made to depend upon it. The court said:

"Whether the transfer made by the decedent in his

lifetime is 'intended to take effect in possession and enjoyment at or after his death' by *reason of that which he retains* is the crux of the problem."

Furthermore the quotation must be construed with specific reference to the facts before the court and the thing actually retained. As stated above this was the entire remainder interest after the life estate, which the settlor's death extinguished and passed to the other trust beneficiary or beneficiaries.

It being apparently assumed that the *Hallock* case will be applied to remote reverters arising by operation of law, the Solicitor General in his brief on reargument declares that adherence to the *Reinecke* case makes the imposition of the tax turn upon the technicality of the existence of an economic interest of little practical consequence. While the observation is true, the anomoly is to be avoided by restricting the application of the *Hallock* case to transfers truly effected by death and having in mind the requirement that the retained interest be substantial from a practical point of view, and that the language of Section 811(c) places the imposition of the tax upon a required *intention*.

If the requirement of the passing of economic benefit on death is eliminated, the crucial problem as to the imposition of the tax under Section 811(c) will turn upon the requirement of the transfer being conditioned on death. If the requirement should be approved in the manner in which it is stated in the Regulations, the imposition of the tax would, in the first place, turn upon nice and subtle questions as to whether the interest of the beneficiary is vested subject to being divested not just by the death of the beneficiary, but by the death of the beneficiary plus some other condition, such as the survivorship of a substituted beneficiary. If the interest of one of the children in the *Speigel* case was vested subject only to being di-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 5

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This petition for rehearing is filed by respondent pursuant to Rule 33 of this Court because of the public importance of the decision of this Court rendered January 17, 1949.

By repudiating the authority of four unanimous decisions of this Court rendered in 1930 and 1931 and by distinguishing two unanimous decisions of this Court rendered in 1938, this Court has required this respondent to pay an estate tax from which others similarly situated over the past eighteen years have been immune. This result has been achieved notwithstanding the fact that Congress, fully aware of the doctrine of *May* v. *Heiner* and of the limited scope of

vested in favor of other living beneficiaries, so that the interest might remain as an asset of the child's estate even though he predeceased Speigel, then the requirement, as stated in the Regulations, would not be satisfied. Yet, on the other hand, the requirement would apparently be satisfied by a trust to last until the death (or a number of years after the death) of the last survivor of a large number of persons, provided merely that the settlor is named as one of the persons. The imposition of the tax might turn upon the rather accidental factor of whether the draftsman in stating the lives measuring the Trust as including, for example, all of the grantor's descendants, happens to include the grantor's life. And any long term trust might be taxed on the view that it would obviously last beyond death.

II.

The Doctrine of May v. Heiner Should Be Adhered to On Its Merits as Not Inconsistent With the Hallock Case.

The three *per curiam* decisions handed down March 2, 1931 which were the subject of the Joint Resolution the following day, and which are popularly embraced in the references to *May v. Heiner*, adopted a plausible construction of Section 811(c), even though it might afterwards appear that the construction was not what Congress had intended. The defense of these decisions is ably presented in the briefs of counsel for the Church estate and other *amici curiae*. The decisions were not required on one view of the *Reinecke* doctrine since economic benefit in the property as a whole was retained, but they are consistent with a logical interpretation since the particular interest which the beneficiaries received, being the remainder after the life estate, was not retained by the grantor and did not pass on his death. The actual interest retained in the

the joint resolution of March 3, 1931, has made no effort in almost eighteen years to broaden the law to the scope which this Court has belatedly accorded it.

The additional revenue which the Treasury will receive as a result of the action of this Court must be deemed insignificant by the Treasury since it has made no effort to get Congress to change the law and since, even before the present decision of this Court, the doctrine of *May* v. *Heiner* was available only to decedents who had established trusts with reserved life estates more than seventeen years ago.

Counsel for the petitioner suggested to this Court at the reargument that, even if petitioner were to prevail on the ground on which it has now prevailed, the Commissioner of Internal Revenue might be expected to issue a general ruling which would accord to the estates of all who had died before the decision of this Court in the *Church* case the same immunity from taxation which has for almost eighteen years been accorded those who could bring themselves within the rule of *May* v. *Heiner*. The Commissioner has done that on previous occasions in tax cases. If this possibility materializes, the Church estate, because it had the misfortune to be selected, not by the government but by this Court, as the test of the vitality of *May* v. *Heiner*, will be subjected to a heavy levy from which all taxpayers similarly situated will be exempt. Such is the danger and injustice inherent in overruling long standing and thoroughly considered tax decisions of this Court.

The petitioner never raised in any court the point on which this case has been adjudicated, although *Hallock*, if it be deemed to foretell the result here, was four years old when this case was tried in the Tax Court. In *Fidelity Co.* v. *Rothensies* (324 U. S. 108) and in

per curiam decisions did not pass on death, but expired. The decisions with perhaps the exception of the holding in the *McCormick* case on the actual facts there involved were thus consistent with the *Hallock* case where the actual interest retained by the decedent passed on his death. (See I above.)

The thought behind the exclusion of the outstanding life estate in the Hallock situation is in the last analysis the same as the thought behind the 1931 decisions—that only the interest which passes from decedent to his donees by reason of his death, not the entire property transferred by him, is to be taxed. This view, consistent with the character of an estate tax, prevents incongruous results such as the taxation of an entire trust because of some minor right or privilege, although such incongruous results should also be prevented by an adherence to requirements as to the intention of the donor.

III.

The Actual Decision in May v. Heiner On the Facts in That Case, at Least If the Life Estate Is Taken as Not Having Come Into Possession, Was Correct as to the Law Prior to March 3, 1931 and Should Be Followed Even as to Trusts Created After the 1932 Amendments to Section 811(c).

Questions 4 and 5 which refer to *May* v. *Heiner*, mention the "*May* v. *Heiner* interpretation" indicating that the Court had in mind the distinction between the actual decision in the case and the interpretation of Section 811(c) which is popularly thought of as having been handed down in the case, but was in fact contained in the three *per curiam* decisions of March 2, 1931. *May* v. *Heiner* was decided April 14, 1930. The settlor-decedent, Mrs. May, conferred an immediate life estate on her husband reserving

Commissioner v. *Estate of Field* (324 U. S. 113), which prior to *Church* and *Spiegel* were probably the most important estate tax cases decided by this Court in a period of eight years, the taxpayers, who had lost below, were granted a most limited review by this Court. They were not permitted to argue here every point of law which had been raised below. In *Church*, on the other hand, the government, which lost twice below, has been invited by this Court to litigate an issue which was never presented for the consideration of either of the lower courts although this Court says that the importance of the issue was clearly apparent from what this Court said in *Hallock*.

Respondent does not contend that this case has not had the thorough consideration of this Court. Nevertheless respondent presents this petition for rehearing in the hope that the Court will again consider what it has done and review the precedent which it has established in overruling old and thoroughly considered authorities when no constitutional issues are involved and when the additional revenues to be anticipated by the Treasury are insignificant to the United States although a heavy burden upon those who must pay.

For all the foregoing reasons respondent respectfully prays that this petition be granted and that the judgment of this Court be upon further consideration reversed.

Respectfully submitted,

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent,

By WILLIAM W. OWENS,
Attorney for Respondent.

Dated: January 31, 1949.

a contingent life estate to herself dependent upon her surviving him. It appears inferentially from the record and was stated by taxpayors' counsel in their briefs that she predeceased him, and her life estate accordingly never came into possession. The court said that the record was not clear, but that it did not matter who survived. The Government's brief in *Burnet* v. *The Northern Trust Company* explained the case on the ground that the Court felt that whatever the situation might be as to an immediately reserved life estate, the tax would not be imposed where a contingently reserved life estate came into effect because the intention of the settlor was different in reserving a contingent life estate than in reserving an immediate one.

The three *per curiam* decisions were handed down approximately a year after *May* v. *Heiner*, and the joint resolution was drafted, introduced and enacted, all on the day following the three decisions. In the intervening year no legislative action was taken with respect to *May* v. *Heiner*. The three subsequent decisions involving a present life estate were the ones which "came almost like a bombshell because nobody ever anticipated such a situation" in the language of Senator Smoot, quoted on page 36 of the Solicitor General's brief on re-argument. The Commissioner's briefs in the three cases sought to distinguish *May* v. *Heiner* rather than to attack it.

It is submitted that in any present consideration of the question of the effect of a reserved life estate, the court should keep in mind the three different situations where:

1. The life estate is immediately reserved.

2. The life estate is contingently reserved but comes into possession before death, and

3. The life estate is contingently reserved and never comes into possession.

In a situation of the contingently reserved life estate,

the decisions of the lower courts are in conflict as to whether the tax is to be imposed even with respect to trusts created after the 1932 amendments to Section 811(c), and clearly the better view, as decided by the Tax Court in *Estate of Curie*, 4 T. C. 1175, and followed in *Nathan*, 6 T. C. 605, is against the tax, and the decision the other way on appeal in the *Nathan* case in the Seventh Circuit, 159 Fed. 2d 546, is not convincing. The Tax Court view would appear to be compelled by the Committee reports.

The report of the House Committee on Ways and Means, 72nd Congress, First Session, pages 46-47 (C. B. 1939-1 page 490) in describing the changes proposed at that time and subsequent to the 1931 Joint Resolution, stated that the insertion of the words "or for any period which does not in effect end before his death" was intended to reach a situation where the decedent "is to have the income from and after the death of another person until his own death *and such person predeceases him.*" The report states that this was regarded as clarifying the Statute, apparently as amended in 1931. If there is serious doubt that such trusts are taxable under the new language, it should be beyond question that they were not reached by the language prior to 1931.

IV.

Reinecke v. Northern Trust Company and May v. Heiner Should Not Be Overruled By the Court at This Late Date.

We respectfully urge that the question at this point is not so much as to whether *Reinecke* and *May* v. *Heiner* would have been decided in the same manner were those cases now before the court for the first time, but it is rather as to whether, after a lapse of nearly twenty years, they

should be overruled where it appears that if they are overruled great damage will be done to estates now pending, and gross discrimination will have been brought about between estates which have been heretofore closed and those that are still open merely because of the fortuitous circumstance that the settlor in estates now open deferred his death until the last few years and after *Hallock* was decided.

The present situation is squarely within the views of this Court as expressed in *U. S.* v. *South Buffalo Railway Co.*, 333 U. S. 771, 774, decided April 26, 1948, where the Court said:

> "It is the Government's contention that the *Elgin* decision [*U. S.* v. *Elgin, Joliet, etc. R. Co.*, 298 U. S. 492] misconstrued the Act, misunderstood its legislative history and misapplied the Court's own prior decisions. It is not necessary in the view we take of the case to decide to what extent, if any, these contentions are correct. It is enough to say that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved. But we do not write on a clean slate. What the Court has written before is one of a series of events, which convinces us that its overruling or modification should be left to Congress. As the Court held on our last decision day, when the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made. *Massachusetts* v. *United States*, 333 U. S. —, decided April 19, 1948. Moreover, in this case, unlike the cited one, Congress has considered the alleged mistake and decided not to change it."

The Court will keep in mind that the Government's lien for taxes continues for a considerable period after death and attaches to all property included in the gross estate. Here again, even in the case of closed estates, unwitting beneficiaries may be held liable for burdensome taxes even

in cases where by lapse of time and subsequent death they are unable to pay or can not obtain just contribution from others equally liable.

In the reserved life estate situation it is apparent that, in view of the Congressional action in 1931, there is no good reason for overruling *May* v. *Heiner*, and the only effect thereof is to penalize pre-1931 trusts which happen now to be open, or pending, or with respect to which the settlors therein are still living. The Joint Resolution overcame the views of this Court as to trusts thereafter made. And this Court, in the light of the detailed and thorough briefs upon the subject, particularly on the part of the Government (*Hassett* v. *Welsh*, 303 U. S. 303), refused to apply the Joint Resolution to trusts created prior thereto. There is no live or current issue left and the court would only be reaching back into the past.

In the reserved life estate case, those estates will be penalized where trusts are created before 1931 and the decedent has died recently; these being the cases where there is presumably, in general, a smaller element of contemplation of death than in the case of persons who died during the intervening years and more shortly and after having created their trusts.

The progress of the tax law against taxpayers inevitably gives advantages to those who make transfers before the law becomes settled against them. The situation of those who created pre-1931 trusts with income retained and whose estates are open for the imposition of the tax is a relatively trivial part of the larger whole. The dollar amounts of tax involved, while significant to the estates affected, are not significant to the national revenue. If the imposition of the tax should have been regarded as a possibility when the trusts were created, at least subsequent estate planning was made on the assumption that they were not taxable and the

settlors have died and will die without power to alter or recall transfers.

The settlors in the reserved income cases could have made complete gifts and defeated the estate tax. The life estates retained were not of benefit to the settlors at the expense of the Treasury, but rather the matter was one between the settlors and the objects of their bounty. The income retained is taxable to the settlors in their top income surtax brackets which serves as a *quid pro quo* for the retention. The Treasury collects the income tax but not the estate tax and one of the two taxes is all that is collected in the case of outright gifts. Freedom from the estate tax is not an unreasonable consequence of placing the remainder interest beyond the power of the decedent.

So far as *Reinecke* is concerned, where the settlor retained no economic interest in the trust estate, Congress has failed to make any statutory change which will overcome that decision, contrary to what it did in the case of reserved life estates by the Joint Resolution of March 3, 1931. The Government's brief on reargument stresses the fact that this Court practically from the outset has construed the estate tax to be a tax upon the transmission of an estate rather than upon its receipt, and no good reason is apparent as to why this Court should now depart from that conception of the tax. Therefore, even if it were thought, if the question were now to be decided for the first time, that the mere fact that the settlor's death is the event which fixes the rights of the beneficiaries is sufficient for the imposition of the tax, still in the absence of Congressional action and its necessary acquiescence in the decision, this Court should not now destroy that decision.

The argument has been advanced by the Commissioner that Sec. 811(c) should be given broad application to tax substitutes for testamentary disposition. But it must be conceded that an outright gift would not be so taxed, and

it would seem that *inter vivos* trusts of the sort in question, being beyond the power or personal benefit of the settlor, more nearly resemble outright gifts than transfers by will. It seems inequitable to subject the settlor to the same tax at the same rates as if he had kept the property and all its benefits. (Tax evasion is not involved where the bundle of rights which are the occasion for the tax are given up but only where the giving up is a sham and they are in fact retained.) In any event it is plainly unjust to do so retroactively as to completed transfers beyond control or recall.

It is an insufficient answer to the above that the trust may have been created before the *Reinecke* or *May* v. *Heiner* decision, so that the settlor could not have relied on it. Assuming that the settlor in legal contemplation assumed the risk of the tax, the estate tax in the 1920's was only a token tax by present standards and was used principally to induce the states to adopt inheritance tax statutes. The rates were trivial by present standards. The size of the tax as well as its philosophy was so changed in the 1930's as to make it in effect a new tax designed to take for the Government the greater part of substantial estates and a large part of modest ones. Settlors in the 1920's were not on notice and could not have expected the enactment of such a new tax and its application to their transfers.

The principal trust involved in the Lloyd estate was created in 1923. The inclusion of the 1923 trust will result in increasing the decedent's gross estate by the sum of $2,099,975. The resultant tax on that inclusion alone would be approximately $1,200,000. The overruling of these long established decisions and the resultant burdening of this estate with that amount of tax, would be a discrimination against this estate, as compared with estates in which the decedents had executed similar trusts, but which were

closed long before, which would be free from tax, merely because of the fortuitous circumstances that William Bross Lloyd did not die until 1946. It would discriminate against Lloyd, Spiegel & Church as compared with persons who retained ownership of their property until death.

With specific reference to the sixth and eight questions asked by the Court, a disposition of property without the reservation of substantial economic benefit or power to alter or affect the beneficial interests is for one thing fundamentally different in character from a testamentary disposition. The essential characteristic of a testamentary disposition is that it is ambulatory and subject to the decedent's control. In the case of a completed transfer, the retention of management powers by the decedent and recognition of family benefits should not lead to the extension of Section 811(c) to tax the transfer, at least in the absence of explicit Congressional action. Even in the income tax field it may be said as a generalization that *Helvering* v. *Clifford*, 309 U. S. 331, has not been extended by the Courts to long term trusts without the retention by the settlor of power to alter the beneficial interests.

Even where power to alter the beneficial interests has been retained, Congress has recognized the harshness of the imposition of the income tax on the settlor where he is without power to relieve himself of the tax except by surrendering his power and control and where such surrender may result in the imposition of a gift tax pursuant to *Sanford* v. *Commissioner*, 308 U. S. 39 contrary to the probable expectation of the settlor who may have believed in creating the trust that he was then making a completed gift and would free himself from income tax. To this end Congress twice enacted a relief provision, appearing first as Section 502(a) of the Revenue Act of 1943 adding Section 1000(e) to the Code and later as a part of Public Law 112 80th Congress (1947), in each case giving settlors

a certain period within which they could surrender their powers without gift tax.

In other words, the tax payers were told that they could keep their powers and pay the income tax or they could release their powers and avoid the income tax without unfavorable tax consequences.

It appears that these enactments must also be construed as having offered to tax payers releasing their powers immunity from an estate tax on the ground that the release was in contemplation of death and it was apparently supposed and recognized that the release would in many cases, in eliminating the power to alter the beneficial interests, free the trusts from estate tax as well as gift tax. This would appear to be in recognition of the proposition that where Court decisions, contrary to the taxpayer's expectation, place the imposition of the tax on possession of certain privileges and at greatly increased rates, the taxpayer should be afforded a choice between the privileges and the tax.

If the retention of management powers as trustee were made the determining factor in the imposition of the tax, the settlor if still living could resign as trustee and might escape the tax in this manner. Settlors who are no longer living, however, would be less fortunate. And if the tax were imposed independently of the existence of management powers there would be nothing which the settlor could do to relieve himself of the estate tax burden.

Accordingly, it is submitted that any such decision of the Court would have the vice of judicial legislation in its operation retroactively on past transfers and would place upon Congress the burden of affording some sort of relief in cases of already completed transfers. It would seem preferable that the extension of the tax to such transfers should be left to Congress.

The Court accordingly should adhere to the former decisions.

The Court could, if it saw fit, say about the *Reinecke* decision what the Court said about the *Elgin* decision in the *South Buffalo* case. In that event there might be a warning to future settlors that they might be subject to tax. To go beyond this and by overruling the cases discriminate against the estates of certain decedents would appear to be without justification.

Respectfully submitted,

LELAND K. NEEVES,
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October, 1948.

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ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

PETITION FOR REHEARING

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

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